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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

TAP ELECTRICAL CONTRACTING SERVICE, INC.,

Petitioner,

vs.

THOMAS F. HARTNETT, as Commissioner of Labor of the State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Does ERISA preempt New York State's prevailing wage law to the extent that it regulates and relates to contractors' employment of trainees enrolled in a Federally-approved training program designed to encourage employment of women and minorities, where such training program is subject to exclusive federal regulation pursuant to ERISA?

(2) Does ERISA preempt the Order of the State Commissioner of Labor, affirmed by the New York Court of Appeals, applying the State prevailing wage law to debar Petitioner from receiving any State contracts, for a violation based solely on Petitioner's employment of "trainees" enrolled in a Federally-approved program in accordance with (a) the terms of an ERISA employee benefit plan, (b) the requirements of a Federally-funded highway construction contract, and (c) Federal regulations designed to facilitate minority entry into the construction trades?

(3) Does ERISA preempt the benefit "supplement" provisions and regulations of the New York's prevailing wage law as enacted, and as enforced by the State Commissioner of Labor against a contractor to the extent that they impose an administrative and record-keeping burden and require an increase in the cost of employer contributions to employee welfare and employee pension benefit plans subject to ERISA?

LIST OF PARENT COMPANIES AND SUBSIDIARIES

The parties to this action are listed in the caption hereof, except that after this action was commenced, John F. Hudacs replaced Thomas F. Hartnett as Commissioner of Labor of the State of New York ("Commissioner").

Petitioner TAP Electrical Contracting Service, Inc. ("TAP") has no parent companies or subsidiaries.[1] Affiliated companies are ASG Consulting Corp., Power Construction Corp. and LoDuca Associates Inc.

TAP is also a participant in separate joint ventures with Lipco Electrical Corporation and The P.J. Carlin Construction Co.

The individual owners of TAP also have ownership interests in CDG Enterprises and 34th Street Associates, partnerships formed to hold certain real properties.

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[1] In an unrelated proceeding, the Commissioner determined that ATS Electrical Contracting, Inc., is an alter ego and successor to TAP.

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OPINIONS BELOW

The initial Order and Determination of the Commissioner of Labor of the State of New York, dated October 31, 1989, unreported, is attached as Appendix A, page 28.[2] The opinion of the New York Supreme Court Appellate Division, Second Department dated December 22, 1989, partially reversing and remitting the Commissioner's October 1989 Order is reported at 156 A.D.2d 612, 549 N.Y.S.2d 118 ("*TAP I*"). (A-22). The opinion of the Court of Appeals of the State of New York dated June 5, 1990, upon leave to appeal[3], partially reversing the Appellate Division, is reported at 76 N.Y.2d 164, 556 N.Y.S.2d 988 ("*TAP II*"). (A-15).

The Order and Determination of the Commissioner of Labor, upon remittitur, dated February 6, 1991 is unreported. (A-10). The opinion of the Appellate Division, dated August 29, 1994, annulling the Commissioner's February 1991 Order in part, is reported at 207 A.D.2d 547, 616 N.Y.S.2d 86 ("*TAP III*"). (A-2). The opinion of the Court of Appeals of the State of New York dated February 21, 1995, finally determining the matter by dismissing petitioner's appeal "upon the ground that no substantial constitutional question is directly involved," is reported at 1995 N.Y. LEXIS 310 ("*TAP IV*"). (A-1).

JURISDICTION

This Court's jurisdiction to review final judgments of the New York Court of Appeals is invoked pursuant to 28 U.S.C. § 1251(b)(2) and § 1257.

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[2] Citations to the accompanying Appendix of Court and Administrative decisions are referenced as "A-[page]," and citations to the accompanying Appendix of Constitutional, statutory and regulatory provisions are referenced as "B-[page]."

[3] The Orders of the Court of Appeals dated February 8, 1990, dismissing both parties' appeals and cross-appeals as of right and granting both parties leave to appeal, are unreported (A-38).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const. art. VI. (B-1).

ERISA §§ 3(1),(3), 514(a),(c),(d), 29 U.S.C. §§ 1002(1),(3), 1144(a),(c),(d). (B-1-2).

Taft-Hartley Act § 302(c), 29 U.S.C. § 186(c). (B-3).

N.Y. Labor Law §§ 220(3),(3-e),(5)-(9), 220-b(3)(b) (McKinney 1986 & Supp. 1995). (B-4-9).

Federal-Aid Highway Act ("FAHA") §§ 113(a)-(c), 140(a)-(c), 315, 23 U.S.C. §§ 113 (a)-(c), 140(a)-(c), 315. (B-10-11).

Regulations pursuant to FAHA: 23 C.F.R. § 230.107-.113 and Part 230, Appendix B of Subpart A (1994). (B-12-19).

Fitzgerald Act, 29 U.S.C. § 50. (B-19-20).

Regulations pursuant to Fitzgerald Act, 29 C.F.R. Parts 29, 30 (1994). (B-20-33).

Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965). (B-33-37).

N.Y. Labor Law §§ 198-c(1), 227 (McKinney 1986). (B-37-38).

Regulations pursuant to N.Y. Labor Law § 220: N.Y. Comp. Codes R. & Regs., tit. 12, § 220.1-.3. (B-39-41).

STATEMENT OF THE CASE

This case involves the devastation in New York State of Federal "training programs" designed to promote the inclusion of women and minority workers in the construction trades, by force of State law prohibiting the use of Federal trainees, even though such State law is Federally preempted.

TAP Electrical Contracting Service, Inc. ("TAP"), by its counsel, petitions for a writ of certiorari to review the final judgment of the Court of Appeals of the State of New York ("Court of

Appeals") upholding the Orders of the Commissioner of Labor of the State of New York ("Commissioner") finding that TAP had violated the State prevailing wage law for public works contracting, N.Y. Labor Law § 220 (McKinney 1986 & Supp. 1995) ("Section 220") and debarring TAP as a State contractor, solely because TAP employed and paid three "trainees" in a Federal training program pursuant to the terms of a Federally-funded highway construction contract. Shockingly, the Commissioner held, and the Court of Appeals affirmed, that TAP's compliance with the terms of its Federal-law obligations constituted a "wilful violation" of State law, notwithstanding the fact that TAP's training program is an "employee benefit plan" subject to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA").

On their face, the Orders of the Commissioner penalizing TAP impermissibly (1) intrude into the arena entrusted to exclusive Federal jurisdiction by ERISA, (2) interfere with the employment of Federal trainees, thus perpetuating the historical and unlawful exclusion of women and minorities from full participation in the construction trades in New York, and (3) ignore well-established Federal jurisprudence.

Under the Supremacy Clause of the United States Constitution, petitioner seeks the nullification, based on ERISA § 514(a), 29 U.S.C. § 1144(a), of the provisions of Section 220 which relate to training programs that are Federally-approved under the authority of the Federal-Aid Highways Act, 23 U.S.C. § 101 *et seq.* ("FAHA"), and the Davis-Bacon Act, 40 U.S.C. §276a.

A. Section 220 Bars the Use of Federal Trainee Workers and Perpetuates Discriminatory Barriers to Entry Into the Construction Trades

In its initial decision in this matter, the Court of Appeals held that Section 220(3) and (3-e) *forbids* Federal "trainees" from working as training-level workers on a Federally-financed highway construction project in New York:

> "[I]t is irrelevant that section 220 may dissuade contractors from hiring Federal trainees on Federally funded projects, as petitioner contends, because *contractors are not even permitted to use these workers in a trainee capacity under [the] statute.*" (*TAP II*, 76 N.Y.2d at 170, 556 N.Y.S.2d at 990-991) (emphasis added). (A-19).

This interpretation of Section 220 punishes contractors, like TAP, who employ Federal trainees on any project financed in part by the State, unless each such trainee is "individually registered" with the Commissioner and is enrolled in a State-registered apprenticeship program. To achieve this result the Court of Appeals wholly ignored the existence of ERISA and disregarded the fact that the apprenticeship provisions of Section 220 directly relate to TAP's Federal training program, which is an "employee benefit plan" subject to ERISA, and thus immune from such State regulation.

The effect of the State's refusal to allow Federal trainees to be employed as such on mixed State- and Federally-funded construction projects is devastating; not only to the contractor who, like TAP, may be subjected to the ruinous sanction of "debarment," but also to our national equal employment policy. By closing the doors to the employment of Federal trainees, New York is perpetuating the historic and well-recognized exclusion of women and minorities from work in the construction trades that Federal training programs were designed to overcome. *See Building Barriers, Discrimination in New York City's Construction Trades*, a Report by the New York City Commission on Human Rights (December 1993) ("Human Rights Commission Report") (Section Heading, p. 18):

> "The New York Plan for Training has been rendered virtually obsolete as the result of the *Monarch* decision.... This is unfortunate, since training programs graduate a significant number of people of color, as compared with joint apprenticeship programs."

See also Exec. Order No. 11,246 §§ I, III; 29 C.F.R. Part 30; 23 U.S.C. § 140; 23 C.F.R. § 230.111(a) and Part 230, Subpart

A, Appendix B. (B-12, 17-19, 29-31, 33, 36-37). *United Steelworkers of America v. Weber*, 443 U.S. 193, 198 n.1 (1979) (judicially noticing the historic exclusion of minorities by trade unions).[4]

Indeed, the Commissioner's policies are being maintained with the State Legislature's full knowledge of their effects because, in 1987, the Court of Appeals expressly recognized the discriminatory effect of Section 220(3) and (3-e) and suggested to the State legislature that it correct what the Court then described as an unforseen "anomaly". *Matter of Monarch Electrical Contracting Corp. v. Roberts*, 70 N.Y.2d 91, 517 N.Y.S.2d. 711 (1987) ("*Monarch*"):

> "Notwithstanding *the compelling policy of eradicating discrimination from our construction industry that is served by the trainee programs*, we are constrained to affirm respondent's interpretation of the statute. We find the statute unambiguous in its recognition of only two classifications of workers -- apprentices and journey-level employees -- and in its requirement that, to be paid apprentice-level wages, individuals must be in an apprenticeship program registered with the New York Department of Labor. *Notwithstanding that both programs are essentially identical*, and that *the trainee programs reduce discrimination in the construction industry*, [N.Y.] Labor Law, as written and as consistently interpreted, *recognizes only apprentices registered with the State Department of Labor.*
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> * * *
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> Although the Legislature clearly intended, in enacting the 1966-67 amendments, to prohibit the use of

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[4] In New York, this exclusion of minorities has historical roots. *See Bias in the Building Industry, an Interim Report to the Mayor*, New York City Commission on Human Rights, (1963) ("People of color, ...either as apprentices or journey persons, were faced with almost insurmountable barriers."), quoted in Human Rights Commission Report, p. 49.

sham training programs that were subverting the purpose of the prevailing wage law, it *did not likely foresee that bona fide, federally approved trainee programs, which are consistent with the purposes of these amendments, would be rejected* as acceptable alternative pools of learning-level workers. Nor could it have foreseen that, by prohibiting the payment of apprenticeship wages to unregistered apprentices, it was also prohibiting the payment of apprenticeship wages to 'trainees' enrolled in these federally administered programs, and thus *anomalously requiring that these 'trainees' be paid a wage four times greater* than that paid to their counterpart 'apprentices'.

In view of the threat presented by respondent's interpretation to the future operation of trainee programs in this State, we believe it would be highly desirable for the Legislature to reexamine Labor Law § 220 in the light of 20 years' experience, for it appears that *its application today unexpectedly frustrates the very important policy of reducing discrimination in the construction labor force.*" (*Monarch*, 70 N.Y.2d at 97-99, 517 N.Y.S.2d at 714-715) (emphasis added).

Although, since the *Monarch* decision, the State Legislature has enacted several minor amendments to Section 220,[5] it has not removed the barriers to Federal trainees.[6] Rather, the Court

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[5] For example, in 1989, the Legislature added "apprentice training" to the definition of benefit "supplements" in Section 220(5)(b) (N.Y. Labor Law § 220(5)(b), amended by N.Y. Laws of 1989, ch. 752, § 1); in 1994, it substituted the "Commissioner of Labor" for the "Industrial Commissioner", in various provisions of §220, paragraph (3) (N.Y. Laws of 1994, ch. 170, § 207).

[6] The State Legislature's failure to act to correct this matter has constitutional implications. *Cf. Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (state has affirmative duty to eradicate discrimination in public functions). In New York, the Court of Appeals has twice struck down affirmative action goals and timetables instituted by the Mayor of the City of New York. *See Broidrick v. Lindsay*, 39 N.Y.2d 641, 385 N.Y.S.2d 265 (1976); *Fullilove v. Beame*, 48 N.Y.2d 376, 423 N.Y.S.2d 144 (1979).

of Appeals has now expanded the application of *Monarch*, which involved an exclusively State-funded project, to Federally-funded construction projects as well. (A-15). Premised on this expanded application of *Monarch*, the Commissioner debarred TAP from receiving any State contracts solely for "impermissibly" employing three Federal trainees on a Federally-funded highway construction contract.

B. Section 220 Regulates ERISA-covered Training Programs, And Is Therefore Preempted

The decision of the Court of Appeals in this matter has placed New York in direct conflict with numerous Federal Courts of Appeal, each of whom has recognized that ERISA preempts state apprenticeship regulations that relate to and regulate ERISA training programs.[7] Indeed, the "very purpose" of these types of individual "registration" requirements, apprentice "ratio" requirements, and complex enforcement machinery and "sanctions" contained in Section 220, is to directly affect ERISA plans: "[they] regulate, and [are] clearly intended to regulate, certain terms and conditions of the [ERISA] apprenticeship programs." *Boise Cascade Corp. v. Peterson*, 939 F.2d 632, 638 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 3014 (1992) ("*Boise Cascade*") (Minnesota apprenticeship "ratio" regulations preempted).

New York's bar to the employment of Federal trainees also flies in the face of Federal regulations promulgated under the

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[7] *See MacDonald* and *Boise Cascade*, discussed below (ERISA preempts apprenticeship rules in Nev. and Minn. respectively); *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 406 (1992) ("*Calhoon*") (ERISA preempts "preferential status" accorded to State-registered programs in Okla.); *Hydrostorage Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*, 891 F.2d 719 (9th Cir. 1989), *cert. denied*, 498 U.S. 822 (1990) ("*Hydrostorage*") (Cal. law restricting apprentice programs preempted); *Associated Builders & Contractors v. Perry*, 869 F. Supp. 1239 (E.D. Mich. 1994) ("*Perry II*") (Mich. prevailing wage law apprentice provisions preempted); *accord*, *Associated Builders & Contractors v. Perry*, 817 F. Supp. 49 (E.D. Mich. 1992) ("*Perry I*").

National Apprenticeship Act, 29 U.S.C. § 50 ("Fitzgerald Act"), which specifically provide for the equivalency of *either* Federal *or* state registration of apprentice training programs. 29 C.F.R. § 29.3(a) (1992). (B-22). In *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270, 275 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2991 (1992) ("*MacDonald*"), the Ninth Circuit noted this regulatory scheme, and held that Federal approval "is *equivalent* to state approval of the apprentice program," and that any contrary result is "preempted by ERISA." (emphasis added). These State-law registration requirements of Section 220, together with related regulations and State enforcement mechanisms, directly regulate participation in, and the terms of, TAP's ERISA training program.[8]

In addition, ERISA preemption is mandated here because the "supplement" (fringe benefit) provisions of Section 220(3), (5)(b) and (5)(c), as enacted, and enforced by the Commissioner against TAP, impermissibly relate to and regulate ERISA benefit plans. These provisions have been held preempted to the extent they require contractors to increase their contributions to their employee welfare and pension benefit plans subject to ERISA. *General Elec. Co. v. New York State Department of Labor*, 891 F.2d 25, 29 (2d Cir 1989), *cert. denied*, 496 U.S. 912 (1990) ("*GE I*"). Yet these preempted provisions have nevertheless been applied by the Commissioner to subject TAP to six years of administrative interference and legal proceedings in addition to the debarment penalty.[9] *See* Appendix A hereto, *passim*. Although the Appellate Division eventually annulled, on ERISA preemption grounds, all of the Commissioner's findings of Section 220 violations other than as to its use of Federal trainees (*see TAP I* and

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[8] According to recent legislation (S. 1580) proposed in the Senate to amend ERISA's preemption provisions to exempt state prevailing wage laws, at least 31 states currently have such laws, typically including apprentice or training program regulations. *See ERISA Preemption of State Prevailing Wage Law: Hearing of the Comm. on Labor and Human Resources United States Senate on S. 1580*, 103rd Cong., 2nd Sess. (1974) (statement of Sen. Arlen Specter) ("S. 1580 Senate Hearings").

[9] Debarment is a "penal" sanction. *Dadson Plumbing Corp. v. Goldin*, 66 N.Y.2d 713, 715, 496 N.Y.S.2d 731, 732 (1985).

TAP III), the Commissioner's purported regulation of TAP's ERISA employee benefit plans remains pervasive and has subjected TAP to unlawful State regulation.

From the outset of the proceedings initiated by the Commissioner, TAP has sought, albeit unsuccessfully, to free its program and its business from impermissible State regulation on the grounds of Federal law preemption. Now that the Court of Appeals has held that its challenge does not raise any "substantial constitutional question," (A-1), this Court offers the only hope that the wrongs of the last six years will be righted.

C. Factual Background

For more than 25 years TAP has been engaged in the business of electrical contracting, providing services primarily to municipalities or governmental units in New York State. Such contracts are statutorily subject to the prevailing wage law, Section 220, even if they are predominantly financed with funds from Federal sources.

1. TAP's Federal and Contractual Obligations

Effective February 27, 1985 TAP was awarded a contract by the New York State Department of Transportation ("NYDOT") to replace lighting on 12.75 miles of the Northern State Parkway, in Nassau and Suffolk Counties, New York (the "Northern State contract"). This work, for which TAP contracted to be paid $2,758,799.93, began in July 1985, was successfully completed in August 1987, and was funded principally by Federal funds provided pursuant to the FAHA. The Northern State contract contained Federal equal employment opportunity and affirmative action mandates pursuant to Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), and FAHA § 140 and its regulations, 23 C.F.R. § 230.111(a) and Part 230 Subpart A, Appendix B, which required TAP to utilize trainees in a Federally-approved training program. (B-10, 12-13, 17-19, 34-37). Because the contract was partially state funded (i.e., approximately 10%), it was also made subject to Section 220 which requires the payment of wages and

supplements (fringe benefits) that the Commissioner deems prevailing.[10]

Pursuant to the requirements of the Northern State contract, TAP employed, until July 1986, three "trainees" who were enrolled in a training program registered with and approved, continuously after March 2, 1981, by the United States Department of Labor ("USDOL") Bureau of Apprenticeship and Training ("BAT"). The specific terms and wages under which these USDOL trainees were employed, and a "Training Special Provision," were incorporated into the Northern State contract after being approved by the NYSDOT and the Federal Highway Administration..[11]

Pursuant to these obligations, TAP provided classroom and on-the-job training, pay and benefits to its trainees on the Northern State project pursuant to the approved training-level wage rates and in accordance with the terms of TAP's collective bargaining agreement ("CBA") with Local 363, International Brotherhood of Teamsters ("Local 363") and the rules and regulations

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[10] In 1983 the legislature essentially delegated to trade unions the authority to set prevailing rates and apprenticeship terms (N.Y. Laws, 1983, ch. 447 § 3-6), even though they are, historically, among the worst perpetrators of the exclusionary practices in the construction industry. In the New York electrical construction industry, the Commissioner adopts the wage, supplement and apprenticeship provisions of the collective bargaining agreement between Local 3, International Brotherhood of Electrical Workers ("Local 3"), and the National Electrical Contractors Association ("NECA"), virtually without oversight or modification of any kind. *See General Elec. Co. v. New York State Dep't of Labor*, 936 F.2d 1448, 1458-59 (2d Cir. 1991) ("*GE II*").

[11] This procedure was required by the FAHA and applicable regulations as a condition for receipt of funding through the Federal program. *See* 23 U.S.C. § 140 (B-10-11); Exec. Order No. 11,246 (B-33-37). Together, the regulations require that Federally-funded highway contractors take affirmative action in hiring, training and promoting minorities and women. To implement this requirement, FAHA regulations direct that a contractor submit for state highway authority approval a training proposal specifying, among other things, the number of trainees, hours and wage rates to be paid to participants in the plan. 23 C.F.R. § 230.111 and Part 230, Subpart A, Appendix B (B-12-15, 17-19). These provisions of the regulation were incorporated, *in haec verba*, in the Northern State contract.

of the Joint Apprenticeship and Training Council of Local 363 ("JATC"). Funding for the program was provided by employer contributions to a Joint Educational Fund ("Fund") which is itself subject to ERISA regulation, as a benefit plan pursuant to the Taft-Hartley Act, 29 U.S.C. § 186(c)(6).[12]

2. Commissioner's Interference With TAP's Trainee Program

This case arose after the Commissioner subjected TAP to a "compliance investigation" and numerous requests for production of records followed by issuance of a March 28, 1988 "notice of labor law investigation findings". Thereafter the Commissioner set an "administrative hearing" before one of his subordinates to determine whether TAP's provision of fringe benefits and use of trainees violated Section 220.[13] Each alleged violation

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[12] There is no dispute that the training program was, at all relevant times, an "employee welfare benefit plan" under Section 3(1)(A) of ERISA, 29 U.S.C. § 1002(1)(A), which expressly includes "apprenticeship and other training programs" within its coverage. ERISA also expressly extends coverage to all Taft-Hartley benefit plans, including training programs, under Section 3(1)(B), 29 U.S.C. § 1002(1)(B). Because TAP's training program was jointly administered by a multi-employer association and the JATC, and funded through a multi-employer benefit fund, it is also a Taft-Hartley benefit plan under 29 U.S.C. § 186(c)(6). (B-1, 3).

[13] On their face, all of the Commissioner's notices and threats of enforcement, from the outset, related to benefit plans provided by TAP and therefore constituted an impermissible state-law intrusion into areas reserved exclusively for Federal regulation under ERISA. *See LaCorte Elec. Constr. & Maintenance, Inc. v. Hudacs*, No. 92 Civ. 1380 (N.D.N.Y., Feb. 17, 1993) (McAvoy, J.) (preliminary injunction against § 220 enforcement action as preempted by ERISA). Despite the repeated pronouncements of this Court and the Second Circuit, the State Labor Department ("NYSDOL") to date persists in its disregard for ERISA preemption by imposing enforcement machinery, and the threat of "debarment" proceedings under Section 220-b(3)(b), to exact compliance with State laws which are actually null and void under the Supremacy Clause of the U.S. Constitution. *See GE I*, 891 F.2d at 27-29. The Commissioner nevertheless promulgated new regulations (N.Y. Comp. Codes R. & Regs., tit. 12, §220.1-.3)(B-39-41), effective February 26, 1992 which continue to relate to, regulate and increase the cost of benefits provided through ERISA plans.

rested upon the Commissioner's application of Section 220 to TAP's provision of employee benefits through its ERISA benefit plans and training programs.[14] On October 31, 1989, the Commissioner found that TAP (i) failed to pay or provide prevailing "supplements" (i.e. fringe benefits) to twenty-eight employees (a total asserted "underpayment" of approximately $9,700 on a $2.75 million contract);[15] (ii) failed to pay journey-level wages and supplements to three "trainees" (a total asserted "underpayment" of approximately $23,500); and (iii) violated Section 220 by using apprentices in excess of "the applicable journey-level/apprentice ratio" set forth in the Local 3-NECA contract (a ratio different from that contained in TAP's CBA and program) and that the violations together "constitute[d] one final wilful determination within the meaning of Section 220-b(3)(b) which mandated TAP's "debarment."[16] (A-26-37). On November 8, 1989 TAP was "debarred" from all public work with the State or any municipal corporation or public body. (B-9).

3. TAP's Judicial Challenge Under the Supremacy Clause

On November 14, 1989 TAP commenced a proceeding under Article 78 of the New York Civil Practice Law and Rules ("C.P.L.R.") to annul the Commissioner's 1989 Order on the grounds that ERISA preempted Section 220 and the Commissioner's actions. On November 28, 1989, the matter was transferred at the behest of the Commissioner, for initial determination before the Appellate Division, Second Department

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[14] At the outset of the hearings, TAP moved to dismiss the complaint on grounds of ERISA preemption. The Hearing Officer rejected TAP's motion, as did the Commissioner in his October 1989 Order. (A-29).

[15] Notably, Section 220 is not concerned with the *value* of benefits provided to employees. Its purpose is to "level the playing field" by equalizing all contractors' *cost* of providing benefits. *See GE I*, 891 F.2d at 28.

[16] In 1984, TAP had been cited for similar violations of Section 220. *TAP Elec. Contracting Service, Inc. v. Roberts*, 104 A.D.2d 548, 480 N.Y.S.2d 215 (2d Dep't 1984).

("Appellate Division"), in accordance with Section 220(3) and C.P.L.R. 7804(g). (*See* A-38-39).

On December 22, 1989 the Appellate Division annulled the Commissioner's Order in part on the grounds that (a) ERISA preempted application of Section 220, with respect to all "supplements" that were provided through TAP's ERISA plans; (b) TAP's use of Federal trainees on a Federally-funded project was "proper;" and (c) the asserted apprentice "ratio" violations "could not" lawfully form a basis for TAP's debarment. *TAP I*, 156 A.D.2d at 614-15, 549 N.Y.S.2d at 120-121. (A-22, 23-25). Specifically, the Appellate Division unanimously held:

> "we are in agreement with the petitioner's assertion that its use of Federal trainees on this Federally funded project was proper and, thus, the Commissioner's finding that the petitioner willfully violated Labor Law article 8 by employing "trainees" must be annulled." (*TAP I*, 156 A.D.2d at 614, 549 N.Y.S.2d at 120). (A-25).[17]

However, the Appellate Division affirmed TAP's debarment on the (erroneous) assumption that TAP had underpaid some undetermined amount of supplements that were not provided through ERISA plans and remitted the matter to the Commissioner to determine the amount (if any) that TAP had underpaid. *TAP I*, 156 A.D.2d at 614-15, 549 N.Y.S.2d at 120. (A-25).[18]

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[17] The Commissioner's finding that TAP committed "wilful" violations appears particularly unjust, given the unanimous finding of the Appellate Division, unless TAP is to be charged with greater knowledge than that of the Appellate justices.

[18] On TAP's subsequent appeal following remittitur, the Appellate Division held in its August 29, 1994 decision that: the Commissioner's unique methodology of computing TAP's underpayment continued to violate the mandate of *GE I*; that the Commissioner's methodology was preempted by ERISA; and that there was in fact *no underpayment*, and hence no violation of Section 220, even as to non-ERISA supplements. *See TAP III*, 207 A.D.2d at 550, 616 N.Y.S.2d at 89. (A-2-6).

On cross appeals,[19] in a decision dated June 5, 1990, the Court of Appeals determined that the only issue before it was "whether the holding in *Monarch* [ ] applies to construction projects jointly funded by State and Federal Governments under the Federal-Aid Highway Act," and reversed the Appellate Division's holding that use of Federal trainees was "proper",[20] on the grounds that:

> "Petitioner was required to pay the three workers registered in Federal training programs journey-level wages because under Section 220 they are *not recognized* as training level workers." (*TAP II*, 76 N.Y.2d at 170, 556 N.Y.S.2d at 990) (emphasis added). (A-19).

and that,

> "Section 220 unambiguously authorizes only two categories of employees, journeymen and apprentices. The statute makes no provision for a third category and *nothing can be read into it to authorize employment of United States Department of Labor*

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[19] The Court of Appeals, by Orders dated February 8, 1990 (A-20, 21), dismissed TAP's and the Commissioner's appeals to the extent taken "as of right," "upon the ground that the order appealed from *does not finally determine the proceeding within the meaning of the Constitution*" and instead granted leave to appeal to both parties. (*Id.*, emphasis added).

[20] TAP asserted in its "Counter-Questions of Law Presented for Review," the following issue, which it fully briefed:

> "(3) Whether Section 220, as applied by the Commissioner in this case, is preempted by the Employee Retirement Income Security Act of 1974 because it relates to and regulates the operation of an ERISA-covered apprentice and training plan."

TAP's direct appeal addressed only the non-ERISA supplements issue, because the Appellate Division had annulled the Commissioner's Order on the Federal trainee issue. Accordingly, TAP's claim of ERISA preemption with respect to Section 220's apprentice provisions could be asserted before the Court of Appeals only *in response* to the Commissioner's cross-appeal placing the trainee matter in issue. TAP specifically argued this issue in its Brief in Response to Respondents' Cross-Appeal, under point heading IV.D.

> *trainees on Federally funded projects.*" (*TAP II*, 76 N.Y.2d at 168-69, 556 N.Y.S.2d at 989) (emphasis added). (A-16-17).

In so reversing, the Court of Appeals did not directly address the question of whether ERISA preempts the Commissioner's Order with respect to TAP's ERISA-covered training program. Rather, after discussing the impact on Section 220 of FAHA and its applicable regulations, the Court of Appeals concluded that "Section 220 is not in conflict with or preempted by Federal law." *TAP II*, 76 N.Y.2d at 170, 556 N.Y.S.2d at 991. (A-19).

On February 6, 1991 the Commissioner issued his Determination and Order on remittitur modifying his previous Order (the "February 1991 Order"). Although that Order found an "underpayment" and wilful violation as to certain non-ERISA supplements, it did so only by artificially "attributing" some of TAP's excess cash payments to its ERISA supplements (A-8-14). TAP again petitioned the Appellate Division for annulment of the Order on grounds of ERISA preemption.[21] In its August 29, 1994 decision, the Appellate Division annulled the Commissioner's February 1991 Order regarding underpayment of supplements as "preempted by ERISA" finding "it is undisputed that no underpayment of the non-ERISA supplements results". *TAP III*, 207 A.D.2d at 550, 616 N.Y.S.2d at 89. (A-6). However, the Appellate Division refused to review the question of ERISA preemption as it related to TAP's employment of training level workers on the ground that the Court of Appeals' reversal of the Appellate Division's 1989 annulment of the Commissioner's Order barred consideration of the issue under the doctrine of res judicata. *Id.* (A-7).

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[21] During the more than two year pendency, *sub judice*, of TAP's appeal, TAP sought relief from the federal courts. However, TAP was precluded from raising the ERISA preemption issue in Federal Court, on the ground that, having commenced its action for review of the Commissioner's Order in State court under C.P.L.R. Article 78, TAP was bound by that route even as to Federal-law and Constitutional issues. Unreported decision of Mischler, J., *Tap Elec. Contracting Service, Inc. v. Hartnett, et al.*, No. 90-0083, (E.D.N.Y. June 25, 1990), *aff'd*, Nos. 90-7645 and 91-0201 (2d Cir. Jan. 16, 1992).

TAP again appealed to the Court of Appeals, urging that ERISA preempted the State law on its face and as applied by the Commissioner. By Order dated February 21, 1995, the Court of Appeals dismissed TAP's appeal, *sua sponte*, "upon the ground that no substantial constitutional issue is directly involved." *TAP IV*, 1995 N.Y. LEXIS 310. (A-1).[22] In concluding that there are no Constitutional issues, the Court of Appeals continued to disregard the fact that Section 220 directly relates to and regulates TAP's ERISA-covered training program; it thus upheld the Commissioner's failure to recognize the Constitutional supremacy of Federal law over state laws that regulate where Federal law forbids.

REASONS FOR GRANTING THE PETITION

New York, by disregarding the comprehensive preemptive effect of ERISA on all state laws relating to or regulating ERISA benefit plans, is impermissibly intruding, with disastrous results, into an arena that Congress reserved exclusively for Federal dominion. Specifically:

1. New York has "frustrat[ed]" and is continuing to frustrate the "compelling policy of eradicating discrimination from [the] construction industry," *Monarch*, 70 N.Y.2d at 97, 517 N.Y.S.2d at 714, by upholding entry-level barriers that State law has imposed, even though these barriers relate to and regulate the terms of an ERISA training program, and are thus preempted.

2. New York's application of its prevailing wage law has engendered a serious "threat... to the future operation of trainee programs in this State," by "requiring that [Federal] 'trainees' be paid a wage four times greater than that paid to their counterpart [State] 'apprentices'." *Id.*, 70 N.Y.2d at 98-99, 517 N.Y.S.2d at 715. This requirement directly relates to the payment terms for trainees in an ERISA

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[22] This Order finally determined the matter, and afforded TAP for the first time a "final judgment or decree from the highest court of a state" from which a writ of certiorari may be sought under 28 U.S.C. § 1257(a).

program, and comprises an enforcement mechanism not provided under Federal law.

3. The Court of Appeals judgement is in direct conflict with the decisions of at least three Federal Courts of Appeal which have held that ERISA preempts (a) state prevailing wage laws that relate to or regulate ERISA-covered apprentice or training programs, and (b) state apprentice "registration" requirements, which fail to recognize US-DOL-approved programs as the legal "equivalent" of state-registered programs.

4. New York's disregard for ERISA's preemptive effect ignores the repeated pronouncements of this Court and of the Court of Appeals for the Second Circuit, *see GE I.* This posture (a) has caused crippling damage to TAP's business solely because TAP relied on the supremacy of Federal rights over inconsistent State laws, and (b) has validated the Commissioner's continuing imposition of State regulations upon contractor's ERISA plans.

Each of these improvident results would be remedied by applying the preemptive effect of ERISA to Section 220 as Congress mandated. Petitioner respectfully urges that each, standing alone, is a vitally important reason for this Court to grant this petition.

I. ERISA PREEMPTS THE PROVISIONS OF SECTION 220(3) AND (3-e) AS ENACTED, AND AS APPLIED BY THE COMMISSIONER

The Congressional enactment of ERISA in 1974 heralded the emergence of a comprehensive and pervasive Federal interest in uniform regulation and protection of employee benefit plans. When this interest was created, it necessarily required displacement of traditional exercises of state power, including provisions of state prevailing wage laws relating to areas that Congress expressly reserved as the exclusive dominion of Federal law.[23]

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[23] Congress specifically included apprentice and training programs in the definition of ERISA plans in the arena defined as exempt from all state

(Footnote continued)

ERISA §514(a) contains a "sweeping" preemption provision that supersedes "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983). A state law "relates to" an employee benefit plan if it has "a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91, 96-97 (1983) ("*Shaw*"). The "deliberately expansive" preemption provision of ERISA, as it relates to employee benefit plans, was regarded by ERISA's Congressional sponsors as ERISA's "crowning achievement." *Pilot Life Insurance v. Dedeaux*, 481 U.S. 41, 46 (1987).

The abiding purpose of this sweeping preemption provision is to "ensure that plans and plan sponsors would be subject to a uniform body of benefits law." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990). Congress accomplished this goal by establishing regulation of all employee benefit plans "as exclusively a Federal concern," *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981), in order to "eliminate the threat of conflicting and inconsistent State and local regulation," *New York Blue Cross Plans v. Travelers Insurance Co.*, 115 S. Ct. 1671, 1677 (1995) ("*Travelers*").

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regulation. Representative Dent, one of the Act's principle sponsors, mentioned inclusion of apprentice programs immediately upon his oft-repeated exposition of the law's preemptive effect: "Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation. . . . The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans . . . On page 8 of the conference report definition No. 31 includes within the reporting requirement union apprenticeship programs. We clearly expect the Secretary of Labor to continue his present policies with respect to such plans and exempt them from the reporting requirements . . ." 120 Cong. Rec. 29197 (1974) (statement of Rep. Dent).

A. TAP's Training Program Is an Employee Benefit Plan Subject to ERISA

Recognizing the importance of "apprenticeship and other training programs" as a principal means of entry to skilled employment opportunities, Congress specifically defined all such programs to be ERISA benefit plans subject to exclusively federal regulation. 29 U.S.C. §1002(1). Congress expressed the scope of ERISA coverage in the plain language of ERISA's definition of "employee welfare benefit plans."[24] 29 U.S.C. §1002(1)(A).

Not only does the definitional language in clause (A) expressly encompass apprenticeship and other training programs, but such training programs are also encompassed within clause (B) of the definitional section, 29 U.S.C. §1002(1)(B), through the phrase "any benefit described in section 186(c) of this title." (All trust funds established by collective bargaining under Section 302(c) of the Taft-Hartley Act, 29 U.S.C. § 186(c)). (B-3).

TAP's training program is an "employee benefit plan" under both ERISA definition sections.[25] The training program in which TAP's employees participated was approved by the US-DOL BAT. The program is extensive, containing written terms for classroom instruction, curriculum, hours, on-the-job training and supervision and testing. Through separate written approval by NYSDOT, as an agent for the Federal Highway Administration, the program specifies the ratio of journey-level workers to trainees, and a progressive schedule of training wages.

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[24] "Employee 'welfare' benefit plans" and "employee 'pension' benefit plans" together comprise the universe of "employee benefit plans" subject to ERISA. 29 U.S.C. §1002(3). (B-1).

[25] Training programs such as the one in which TAP's employees participated have uniformly been held to comprise ERISA "employee benefit plans", subject to the statute's preemptive effect. *See Local Union 598 v. J.A. Jones Construction Co.*, 846 F.2d 1213, 1217 (9th Cir), *aff'd mem.*, 488 U.S. 881 (1988) ("*Jones*"); *accord, MacDonald*, 949 F.2d at 272; *Boise Cascade*, 939 F.2d at 637; *Hydrostorage*, 891 F.2d at 727-28; *Calhoon*, 957 F.2d at 1557-58. In this matter, the Commissioner has never disputed that the training program in which TAP's trainees participated was at all relevant times an "employee benefit plan" subject to ERISA.

The program is funded according to the terms of TAP's collective bargaining agreement with Local 363, and is cooperatively administered by union and management. It is funded by a Taft-Hartley trust fund established through a CBA "for the purpose of . . . defraying the cost of apprenticeship or other training programs." 29 U.S.C. § 186(c). (B-3).

B. Section 220, As Enacted And As Applied By The Commissioner, Refers To ERISA Training Programs, And Affects And Purports To Directly Regulate Their Administration And Terms.

In *Traveler's*, this Court recently reviewed the parameters of the types of state laws that impermissibly "relate to an employee benefit plan" within the meaning of ERISA § 514(a), 29 U.S.C. §1144(a). (B-2). In interpreting Congress' intended meaning of the pivotal phrase "relate[s] to," the Court set forth specific examples of state-law activity that related to ERISA plans so as to trigger preemption. 115 S. Ct. at 1677-1680.

Five of this Court's illustrations of state regulation sufficient to trigger ERISA preemption standing alone, have been visited on TAP by Section 220, as applied by the Commissioner: (i) where state law "refers to" ERISA employee benefits plans, *citing District of Columbia v. Greater Wsh. Bd. of Trade*, 113 S. Ct. 580, 583 n.1 (1992); (ii) where state law purports to regulate ERISA plan terms, for example, by imposing a specific plan requirement, *citing Shaw*, above, 463 U.S. at 97; (iii) where state law prevents an ERISA plan from utilizing elements "permitted by Federal law," *citing Alessi*, above, 451 U.S. at 524; (iv) where state laws impose "alternate enforcement mechanisms", *citing Ingersoll-Rand*, 498 U.S. at 142-143; and (v) where an ERISA benefit plan is exposed to inconsistent regulatory schemes, *citing, inter alia, FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990). *Travelers*, 115 S. Ct. at 1677-1678.

Section 220 as enacted and as applied herein commits all of these evils: (i) it refers to ERISA plans, (ii) purports to regulate their terms, (iii) prohibits what Federal law permits, (iv) imposes alternate enforcement mechanisms, and

(v) exposes contractors to inconsistent obligations; it plainly compels preemption.

1. The Commissioner specifically referred to TAP's ERISA training program

By determining in his October 1989 Order that "TAP under[paid] prevailing wages and supplements to three individuals it classified as 'trainees' on the project" the Commissioner specifically applied Section 220 to TAP's ERISA training program. Since TAP's training program was *specifically referred to* in the Hearing Officer's Report and Recommendations ("Report"),[26] adopted by the Commissioner in his Order (A-29), *see TAP II*, 76 N.Y.2d at 168-71, the Commissioner's Order directly relates to and purports to apply Section 220 to such program.

Similarly, the provisions of Section 220 prescribing prevailing "supplements", by definition in Section 220(5)(b), expressly refer to the type of "non-wage" benefits that can only be provided through ERISA plans, including "apprenticeship training":

> "'supplements', for the intents and purposes of this article, means all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are *not wages* within the meaning of the law, including, but not limited to, *health*, *welfare*, non-occupational *disability*, *retirement*, vacation benefits, holiday pay, life insurance, and *apprenticeship training*." N.Y. Labor Law §220(5)(b) (emphasis added). (B-6).

State regulations set forth in N.Y. Comp. Codes R. & Regs., tit. 12, § 220.1-.3 (B-39-41) demonstrate that the Commissioner applies Section 220 to each of these "supplements" (including "apprenticeship training or other similar programs")

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[26] The Report stated at page 25: "TAP had three (3) employees classified as "Trainees," *which were part of a United States Department of Labor program that they participated in with Local 363 IBT/JATC*. None of the trainees were classified as apprentices nor enrolled in a bona fide apprenticeship program registered with the State Department of Labor" (emphasis added).

irrespective of their provision through ERISA plans. These direct references to ERISA benefit plans trigger preemption under the holdings of *Greater Washington*, 113 S. Ct. at 583; *accord*, *Mackey v. Lanier Collection Agency & Svc, Inc.*, 486 U.S. 825, 843 (1988); *Traveler's*, 115 S. Ct. at 1676.

2. Section 220 directly regulates the terms of TAP's ERISA training program

Section 220(3) and (3-e) requires that TAP do one of three things with respect to the trainees in its program: (i) force the trainees to "individually register with a state-registered apprentice program," (ii) stop using the trainees; or (iii) pay the trainees at journey-level rates (approximately four times the trainee rate). *See TAP II*, 76 N.Y.2d at 168, 556 N.Y.S.2d at 989. Each of these alternatives impermissibly favors State-registered plans and directly affects the administration and terms of TAP's program.

These *de facto* State-law requirements dictate who may, and who may not, participate in an ERISA training program. As the Court of Appeals in *Monarch* made clear, the entry requirements "of the trainee programs are job-related and much less stringent than those of State-approved apprentice programs, having been designed to promote minority group participation." 70 N.Y.2d at 97, 517 N.Y.S.2d at 714. The more stringent entry requirements in the State program are the barriers Congress sought to tear down. They also constitute a substitution of State-imposed entry terms for those in TAP's ERISA program.

According to the Commissioner, TAP also has the "choice" under Section 220 of paying trainees in its ERISA program as "journeymen", i.e., "requiring that these 'trainees' be paid a wage four times greater than that paid to their counterpart 'apprentices'." *Monarch*, 70 N.Y.2d at 98, 517 N.Y.S.2d at 715. However, this "option" also regulates the program's terms in three ways. *First*, the State law impermissibly substitutes rates (taken from the Local 3 collective bargaining agreement) for the progression of trainee wage rates contained in TAP's approved training program. *See Shaw*, 463 U.S. at 108-09. *Second*, the expense of paying a training-level worker quadruple the training-level wage effectively compels a contractor, by dint

of economic reality, to abandon its participation in the program. *Calhoon*, 957 F.2d at 1561 (ERISA does not allow states, by means of a minimum wage scheme, to accord "preferred status" to some benefit plans over others).[27] Such economic effect triggers ERISA preemption:

> "In order for such an [ERISA] apprenticeship program to work, it is essential that the employer be able to pay lesser wages to [training-level workers] while they are in training." (*MacDonald*, 949 F.2d at 274).

Third, the State's requirement that the employer pay trainees in its program at quadruple their normal rate is a form of economic sanction, or an "alternate enforcement mechanism", designed to compel a contractor to conform its program to State prescription. This result is also in impermissible under ERISA. *See Ingersoll-Rand*, 498 U.S. at 142-143 (alternate enforcement mechanisms under State law preempted by ERISA).

Section 220(3-e) directly regulates the terms of TAP's ERISA plan in an additional way: that subsection purports to dictate "the allowable ratio of apprentices to journeymen," by reference to the ratio in the *registered program*, i.e., the State-registered apprenticeship program, as opposed to a contractor's ERISA plan. (*See* B-5-6). This requirement forces TAP to conform its ERISA program to State-imposed prescription. As the Eighth Circuit noted in *Boise Cascade*, 939 F.2d at 637, in which a similar Minnesota law was held invalid under ERISA, the "very purpose" of such a state prescription of apprentice ratios is to compel compliance with the State's program, rather than the contractor's:

> "The minimum jobsite ratio rule directly affects an ERISA plan: it regulates, and was clearly intended to regulate, certain terms and conditions of the

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[27] *See also, Keystone Chapter, Associated Builders and Contractors v. Foley*, 37 F.3d 945, 963 (3d Cir. 1994), *cert. denied*, 115 S.Ct. 1393 (1995) ("though a state may set a minimum wage, if that minimum were so high ... the law might well be found to restrict choices of ERISA plans").

> apprenticeship programs by establishing the manner in which employers can train and employ both journeymen and apprentice pipefitters."

Id. 939 F.2d at 638 (emphasis added); *accord*, *Jones*, 846 F.2d at 1220-21; *Hydrostorage*, 891 F.2d at 729.

Like *Boise Cascade* and *MacDonald*, cases confronting a state's direct regulation of ERISA apprenticeship plans "have virtually taken it for granted that state laws which are specifically designed to affect employee benefit plans are preempted under § 514(a)." *Ingersoll-Rand*, 498 U.S. at 140 (citations and internal quotations omitted); *accord, Mackey v. Lanier Collection Agency*, 486 U.S. at 829.

3. New York law prohibits what Federal law permits

In *Alessi*, 451 U.S. at 524, this Court held that New Jersey could not prohibit ERISA plans from calculating benefits in a manner permitted by Federal law. Yet in this case, Federal law expressly permits what State law prohibits.

Under FAHA, TAP's Federal training program, as authorized in its Federally-funded contract, is expressly *exempted* from the *Federal* prevailing wage law, the Davis-Bacon Act, 40 U.S.C. § 276a. Specifically, FAHA Section 113, 23 U.S.C. §113, provides for Federal "prevailing wages" on Federally-funded highway contracts, but exempts these requirements as to "employment pursuant to apprenticeship and skill training programs" certified by the Federal Highway Administration to promote equal employment in Federal-aid highway construction, as here. 23 U.S.C. §113(c). (B-10). Thus, as in *Alessi*, Federal law affords TAP precisely the exemption which state law declines. The Court of Appeals made this dichotomy perfectly clear in its decision in *TAP II*:

> "[S]ection 220 does not interfere with or obstruct the requirements of the Davis-Bacon Act or the FAHA exemption for trainees from that Act because it does not purport to raise the minimum wage paid to Federal trainees. *It merely requires that State-registered*

> *trainees be hired instead of Federal trainees,* thus determining that for State-subsidized projects New York's participation in FAHA and its skills training obligations will be fulfilled by use of trainees registered under New York law. Petitioner was required to pay the three workers registered in Federal training programs journey-level wages because under section 220 they are not recognized as training level workers. Furthermore, *it is irrelevant that section 220 may dissuade contractors from hiring Federal trainees* on Federally-funded projects, as petitioner contends, because contractors are *not even permitted* to use these workers in a trainee capacity under statute." (*Id.*, 76 N.Y.2d at 170, 556 N.Y.S.2d at 990). (A-18-19).

In so holding, the Court of Appeals failed to grasp that this disparate effect of State and Federal law, when imposed upon an ERISA plan, triggers ERISA preemption. *Alessi*, 451 U.S. at 524; *accord, Traveler's*, 115 S. Ct. at 1678. *See also MacDonald*, 949 F.2d at 275 (state may not decline to recognize Federal program as the legal equivalent of State-registered apprentice program, without encountering ERISA preemption).

4. Section 220 imposes "alternate enforcement mechanisms" on ERISA programs

Section 220 imposes enforcement mechanisms nowhere contemplated by ERISA or any other Federal statute respecting trainees or apprentices. Such additional sanctions and enforcement schemes are preempted when applied to ERISA plans. *Ingersoll-Rand*, 498 U.S. at 141-142; *accord, Traveler's*, 115 S. Ct. at 1678.

> "Allowing state based actions like the one at issue here would subject plans and plan sponsors to burdens not unlike those that Congress sought to foreclose through §514(a)." (*Ingersoll-Rand*, 498 U.S. at 142).

Indeed, TAP suffered imposition of an entire array of state "enforcement mechanisms," merely for adhering to the terms of its ERISA program: e.g., "compliance investigations" (Section 220(7)); "administrative hearings" (Section 220(8)); citations

for "violations" (Section 220(9)); withholding of funds (Section 220-b(1)); "civil penalties" (Section 220(8)); the penal sanction of debarment (Section 220-b(3)(b)). (B-7-9). Indeed, Section 220 even imposes criminal penalties (Sections 220(9); *see also* N.Y. Labor Law §§ 227, 198-c(1). (B-37-38). Each of these sanctions are state-law "enforcement mechanisms" not contained in ERISA, but intended to compel compliance with the State's apprentice prescriptions applicable to ERISA programs; they are therefore preempted. *Ingersoll-Rand*, 498 U.S. at 133; *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 327 (2d. Cir. 1985), *aff'd mem.*, 477 U.S. 901 (1986).

5. Section 220 subjects contractors' ERISA programs to inconsistent regulatory schemes

TAP's ERISA training program has been subjected through Section 220 to State regulatory schemes that vary from Federal law. In addition, the requirements of New York's prevailing wage law, as it applies to an ERISA training program, *vary from "locality" to "locality"*. Section 220 makes clear that the prevailing wages and supplements (the latter, by definition including "apprenticeship training" per § 220(5)(b)) mean those wages and benefits paid or provided "by virtue of collective bargaining agreements ... in the same trade... *in the locality*." *See* Section 220(3) and (5)(a) through (d). (B-4-7).[28]

Under Section 220's statutory scheme, when employees in an ERISA training program move from one worksite to another across counties of the State (as highway construction projects do), the terms of the ERISA training program become subject to varying "prevailing practices in the locality," § 220(5)(c), and hence varying substantive demands. This fact helped to persuade the Second Circuit in *GE I* to hold the supplement provisions of Section 220 preempted by ERISA:

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[28] Section 220(5)(c) and (5)(d) define, respectively, "prevailing practices in the locality" and "locality," for purposes of ascertaining differing supplement levels in various areas of the State. (B-7).

> "At the present time, there is not even unity [of prevailing supplement obligations] as between Nassau/Suffolk Counties on the one hand and Kings/Queens Counties on the other. Moreover, GE cannot eliminate the differences by single cash payments, as in *Fort Halifax Packing Co. v. Coyne, supra*...it is required to make continuous calculations, adjustments and payments." (*GE I*, 891 F. 2d at 29) (citations omitted).

These concerns have no less force as to TAP's ERISA training program at issue here.[29]

Accordingly, the apprentice provisions of Section 220(3) and (3-e) commit each of the transgressions detailed in *Traveler's*, and are therefore preempted by ERISA.[30]

C. Section 220's Apprentice Regulation Provisions Are Not Saved By ERISA's "Savings Clause"

ERISA Section 514(d), 29 U.S.C. §1144(d), contains a clause providing in relevant part that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States...." (B-2). The Commissioner has argued that this "savings clause" serves to avoid ERISA preemption, on the theory that such preemption would "impair" duties that are "delegated" to the State under regulations pursuant to the Fitzgerald Act, 29

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[29] Indeed, to the extent apprentice training is defined as a "supplement" in Section 220(5)(b), the Commissioner's actions herein are in violation of the injunction entered pursuant to *GE I* (*see* 891 F.2d at 30), enjoining enforcement of its supplement provisions as to employee welfare benefits provided through ERISA plans, as the training program here.

[30] In addition, Section 220's application to TAP's apprentice program subjects it to a continual administrative burden of reporting, record-keeping, and recomputation to assure compliance with State requirements. This effect also compels preemption under *GE I*, 891 F.2d at 29; *accord, Perry II*, 869 F. Supp. at 1246.

U.S.C. § 50.[31] The Commissioner's "savings" argument has properly been rejected by the Federal Courts as misconstruing the Fitzgerald Act.

Under the Fitzgerald Act regulations, eligible state agencies may be "recognized" as "State Apprenticeship Councils" and thereby accorded limited duties relating to the administration of the *Federal requirements* for apprentice programs. *See generally* 29 C.F.R. Parts 29, 30. (B-20-33). However, nothing in the Fitzgerald Act or its regulations authorizes a State to impose, through its prevailing wage law or otherwise, additional regulations affecting the terms, entry and payment under an apprenticeship program, nor to impose an array of sanctions for departure from any state-mandated terms as the Commissioner has imposed here. *MacDonald*, 949 F.2d at 274:

> "any state regulation of apprenticeship programs that is separate and apart from the authorization given by the Fitzgerald Act and its accompanying regulations is preempted by section 514(a) of ERISA."

This holding was premised on the specific terms of the Fitzgerald Act regulations, 29 C.F.R. § 29.3, which provide that *either* Federal *or* State approval of an apprenticeship program meets the requirement of the Act:

> "For a program to be determined by the Secretary of Labor as being in conformity with these published standards the program must be registered with the Bureau *or* registered with and/or approved by a State Apprenticeship Agency or Council recognized by the Bureau." (29 C.F.R. § 29.3(a)) (emphasis added). (B-22).

Based on the Federal regulations, the Ninth Circuit concluded, contrary to the Court of Appeals in *Monarch*, 70

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[31] The Commissioner has advanced this assertion in *TAP III* and in a state-law case, *J.F.B. Painting & Supply Inc. v. Hudacs*, 620 N.Y.S.2d 612 (3d Dep't 1994); *see also Kolsch, Inc. v. New York City School Construction Auth.*, 621 N.Y.2d 628 (2d Dep't 1995).

N.Y.2d at 97-99, 517 N.Y.S.2d at 714-15, that a Federally-approved program is the legal "equivalent" of State-law approval, and that any contrary conclusion by a State would exceed the authority of 29 C.F.R. § 29.3, and thus would be not "saved" from preemption. *MacDonald*, 949 F.2d at 275.[32] *Accord*, *Perry I*, 817 F.Supp. at 53, ("preemption of the [State apprentice] ratio and equivalency requirements [i.e., individual registration] will not alter. . . impair or supersede any law of the United States"); *see also Perry II*, 869 F. Supp. 1239, 1252-53.

Section 220's enforcement mechanisms are similarly in excess of the Fitzgerald Act regulations. As the Tenth Circuit held in *Calhoon*, 957 F.2d at 1562, the Fitzgerald Act and its regulations "relate only to eligibility for Federal registration" and "neither [of them] ... contemplate enforcement mechanisms"; *accord*, *Hydrostorage*, 891 F.2d at 731.

Similarly, the Second Circuit in *Joint Apprenticeship and Training Council of Local 363 v. New York State Department of Labor*, 984 F.2d 589, 594 (2d Cir. 1993), held that the Fitzgerald Act gave New York authority to "deregister" an apprentice training program pursuant to N.Y. Labor Law § 810 without running afoul of ERISA, because this procedure merely enforced Federal regulations and was "*not a means of enforcing section 220 of New York Labor Law.*" (emphasis added). By contrast the Commissioner's finding of a "wilful violation," and his imposition of "civil penalties," and the ultimate sanction of "debarment," against TAP far exceed any of the functions accorded a state under the Fitzgerald Act, and thus can not "save" the Commissioner's intrusion upon ERISA.

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[32] *See also, Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnesota Dept. of Labor and Industry*, 1995 U.S. App. LEXIS 2868, pp 15-16 (8th Cir. 1995), ("Because Minnesota's apprenticeship exemption allows approval by *either* the State *or* Federal agency... Minnesota's exemption is saved under ERISA's savings clause.") (emphasis in original).

II. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH ESTABLISHED FEDERAL LAW.

As set forth above, the Court of Appeals judgement in TAP's case is inconsistent with established Federal Law and decisions of Circuit Courts of Appeals as expressed in *MacDonald*, *Boise Cascade*, *Calhoon*, *Hydrostorage*, *GE I*, *Perry I* and *II*, *above*.

Petitioner respectfully requests that this Court resolve this conflict between the State and Federal courts, to prevent the State from unconstitutionally intruding into areas reserved exclusively for Federal law, and to end the frustration of Federal training programs in New York, in furtherance of the equal employment opportunity goals they were designed to achieve.

CONCLUSION

In sum, ERISA preempts state regulation of apprentice and other training programs wherever such regulation exceeds the Federal regulations promulgated pursuant to the Fitzgerald Act. ERISA preemption of State-law apprenticeship regulations occurs, at least, wherever the state statute fails to recognize a Federally-approved program as the legal equivalent of a state-approved program, as New York has here failed to do. For the foregoing reasons, petitioner prays that this Petition for a Writ of Certiorari to the New York Court of Appeals be granted.

May 22, 1994

Respectfully Submitted,

JAMES S. FRANK
DAVID E. PRAGER

PHILLIPS NIZER BENJAMIN
KRIM & BALLON LLP

Attorneys for Petitioner TAP Electrical Contracting Services, Inc.

APPENDIX A

STATE OF NEW YORK,

COURT OF APPEALS FEB 27 1995

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-first ***day of*** February 1995

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 238 SSD 14

In the Matter of Tap Electrical Contracting Service, Inc.,

Appellant,

v.

Thomas F. Hartnett, &c.,

Respondent.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte,* upon the ground that no substantial constitutional question is directly involved.

/s/ Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION :
SECOND JUDICIAL DEPARTMENT

4321q
S/hu

207 AD2d 547

Argued - June 2, 1994

THOMAS R. SULLIVAN, J.P.
VINCENT R. BALLETTA, JR.
JOHN COPERTINO
FRED T. SANTUCCI, JJ.

91-06489

ORDER &
JUDGMENT

In the Matter of Tap Electrical Contracting Service, Inc., etc., petitioner, v Thomas F. Hartnett, etc., respondent.

Phillips, Nizer, Benjamin, Krim & Ballon, New York, N.Y. (James S. Frank and David E. Prager of counsel), for petitioner.

G. Oliver Koppell, Attorney-General, New York, N.Y. (Jane Lauer Barker, M. Patricia Smith, and Jennifer S. Brand of counsel), for respondent.

Proceeding pursuant to CPLR article 78 to review a final order and determination of the Commissioner of Labor of the State of New York, dated February 6, 1991, made upon remittitur from an order and decision of this court dated December 22, 1989 (*see, Matter of Tap Elec. Contr. Serv. v Hartnett*, 156 AD2d 612, *mod* 76 NY2d 164), which modified a prior order and determination of the Commissioner of Labor dated October 31, 1989, by revising the amounts of underpayments reflecting wage supplements not covered by the Employee Retirement Income Security Act of 1974 (29 USC § 1001 *et seq.*), which the petitioner had failed to pay to or on

behalf of 28 employees, in willful violation of Labor Law article 8.

ADJUDGED that the petition is granted, on the law, without costs or disbursements, to the extent of annulling the first, second, and third decretal paragraphs of the final order and determination dated February 6, 1991, the petition is denied in all other respects and the final order and determination dated February 6, 1991, is confirmed to the extent that it affirmed the order and determination dated October 31, 1989, insofar as modified by the decision and order of this court dated December 22, 1989 (*see, Matter of Tap Elect. Contr. Serv. v Hartnett*, 156 AD2d 612, *mod* 76 NY2d 164, *supra*).

In January 1985 the petitioner entered into a contract with the New York State Department of Transportation to replace lighting on a 12.75-mile section of the Northern State Parkway. The project was funded by the Federal and State Governments. Pursuant to Labor Law § 220, the State's prevailing wage law, the petitioner provided supplements to its workers through a combination of benefits and lump sum cash payments. Four of the supplement plans were covered and governed by the Employee Retirement Income Security Act 1974 (29 USC § 1001 *et seq.*) (hereinafter the ERISA supplements). Three other supplements, specifically, vacation and holiday pay, supplemental unemployment benefits, and benefit fund supplements, were non-ERISA supplements (hereinafter the non-ERISA supplements). Furthermore, in order to comply with the applicable prevailing wage-rate schedules, the petitioner was required to pay additional amounts towards both the ERISA and the non-ERISA supplements. This the petitioner did through weekly cash payments directly to its employees (hereinafter the weekly cash payments).

As a result of an investigation by the New York State Department of Labor, the petitioner was charged, *inter alia*, with willfully violating Labor Law § 220 by (1) underpaying prevailing wages and supplements to three individuals whom the petitioner had erroneously classified as "trainees"; (2) failing

to pay prevailing supplements to or on behalf of 28 other employees; and (3) employing an excessive number of apprentices in violation of the applicable apprentice ratio as required by the prevailing wage schedule in the contract. In an order and determination dated October 31, 1989, the Commissioner of the Department of Labor (hereinafter the Commissioner) determined that the petitioner had willfully violated Labor Law § 220 with respect to all of the above allegations. Since this was the petitioner's second final determination of a willful violation of the prevailing wage law within a six-year period, the petitioner was barred from bidding on any public work contract for five years.

The petitioner commenced a CPLR article 78 proceeding in this court for review of the Commissioner's determination, arguing, *inter alia*, that Labor Law § 220 was preempted by ERISA. In accordance with *General Elec. Co. v New York State Dept. of Labor* (891 F2d 25, *cert denied* 496 US 912), this court concurred that ERISA preempted the Commissioner's determination insofar as it related to petitioner's ERISA supplements, and the matter was remitted to the Commissioner to calculate the amount by which petitioner had underpaid the non-ERISA supplements (*see, Matter of Tap Elec. Contr. Serv. v Hartnett, supra*).

In recalculating the amount of the petitioner's non-ERISA supplement underpayments, rather than applying the full amount of the weekly cash payments to the non-ERISA supplements, the Commissioner apportioned those payments between the ERISA supplements and the non-ERISA supplements. He did so according to the manner in which the petitioner had originally intended to allocate its payments to the supplements (i.e., if, when the weekly cash payments were made, the petitioner intended that 50% of the payments were to cover non-ERISA supplements; then, when recalculating the amount of the non-ERISA underpayments, the Commissioner credited only 50% of the payments to non-ERISA supplements).

In an order and determination dated February 6, 1991, the Commissioner again concluded that the petitioner had willfully underpaid the non-ERISA supplements, but by an amount less than previously determined. Thus, he modified his October 1989 order and determination to reflect this, but otherwise affirmed that order, particularly as it related to determining that the petitioner had underpaid prevailing wages and supplements to the three employees petitioner had erroneously classified as "trainees", and barring the petitioner from bidding on public work projects until November 1994. The petitioner subsequently commenced this second CPLR article 78 proceeding to review the Commissioner's February, 1991 order claiming, *inter alia*, that because the order applied a portion of the weekly cash payments to ERISA supplements, the order "related to" and, therefore, was preempted by, ERISA.

It is well settled that ERISA was "designed to have a sweeping preemptive effect in the employee benefit plan field" (*American Progressive Life and Health Ins. Co. v Corcoran*, 715 F2d 784, 786; *see*, 29 USC § 1144[a]; *Ingersoll-Rand Co. v McClendon*, 498 US 133), and that all state laws that relate to employee benefit plans are preempted (*see, General Elec. Co. v New York State Dept. of Labor*, 891 F2d 25, 29, *supra*). Before addressing the issue of whether the Commissioner's order "relates to" and, therefore, is preempted by, ERISA, we note that the order constitutes a "state law" within the meaning of ERISA (*see*, 29 USC § 1144 [c][1]; *National Elevator Indus. v Calhoon*, 957 F2d 1555, 1557-1558, *cert. denied* __US__, 113 S Ct 406).

The Supreme Court has "repeatedly stated that a law 'relates to' a covered employee benefit plan for purposes of [ERISA] § 514 (a) 'if it has a connection with or reference to such a plan' " (*District of Columbia v Greater Washington Bd. of Trade*, __US__, 113 S Ct 580, quoting *Shaw v Delta Air Lines, Inc.*, 463 US 85, 97; *see, Ingersoll-Rand Co. v McClendon, supra*, at 139). ERISA's preemption clause is "conspicuous for its breadth" (*Ingersoll-Rand Co. v McClendon, supra*, at 138, quoting *FMC Corp. v Holliday*, 498 US

52, 58). "What triggers ERISA preemption is * * * an effect on the primary administrative function of benefit plans, such as determining an employee's eligibility for a benefit and the amount of that benefit" (*Aetna Life Ins. Co. v Borges*, 869 F2d 142, 146-147 [2d Cir], *cert denied*, 493 US 811; *see, Monarch Cement Co. v Lone Star Industries, Inc.*, 982 F2d 1448, 1452 [10th Cir]). Among those laws that "relate to" ERISA plans are "laws that create reporting, disclosure, funding, or vesting requirements for ERISA plans" and "laws that provide rules for the calculation of the amount of benefits to be paid under ERISA plans" (*Martori Bros. Distributors v James-Massengale*, 781 F2d 1349, 1356-1357, *cert denied* 479 US 1018; *see, General Elec. v New York State Dept. of Labor*, 891 F2d 25, 29, supra).

By applying a portion of the weekly cash payments to ERISA supplements in the present case, the Commissioner's February 1991 order determined the amount of an employee's benefit (*see, Aetna Life Ins. Co. v Borges, supra*). It also created a funding requirement and provided a rule for the calculation of the amount of benefits to be paid under the employees' ERISA plans (*see, Martori Bros. Distributors v James- Massengale, supra; General Elec. v New York State Dept. of Labor, supra*). By doing so, the Commissioner required TAP "either to bring [its ERISA supplements] into conformity with those prevailing in the locality * * * or to make up the difference through cash payments to [its] employees" in violation of ERISA (*see, General Elec. Co. v New York State Dept. of Labor*, 891 F2d 25, 29, supra). Thus, the Commissioner's February 1991 order is preempted by ERISA.

Since the petitioner's weekly cash payments could not be applied to ERISA supplements, it follows that they could be applied only to the non-ERISA supplements. Doing so, it is undisputed that no underpayment of the non-ERISA supplements results. Therefore, the matter need not be remitted to the Commissioner again (*see, Matter of Action Elec. Contrs. Co. v Goldin*, 64 NY2d 213, 223).

We confirm the Commissioner's order, however, insofar as it determined that the petitioner willfully violated Labor Law § 220 and barred the petitioner from bidding on or being awarded any public work contract until November 1994 since this was the second final determination of a willful violation by the petitioner within a period of six years (*see*, Labor Law § 220-b [3][b]). As previously noted, one basis for the Commissioner's determination that the petitioner willfully violated Labor Law § 220 was that it underpaid prevailing wages and supplements to three individuals it classified as "trainees". Although we annulled this finding in our previous order (*see, Matter of Tap Elec. Contr. Serv. v Hartnett, supra* at 615), the Court of Appeals reinstated this portion of the Commissioner's determination after concluding that Federal law does not preempt Labor Law § 220 in this regard and finding that the Commissioner's determination of the petitioner's willful violation of Labor Law § 220 on this basis was supported by substantial evidence in the record (*see, Matter of Tap Elec. Contr. Serv. v Hartnett*, 76 NY2d 164, *supra*). Therefore, the doctrine of res judicata bars petitioner from relitigating this issue (*see, O'Brien v City of Syracuse*, 54 NY2d 353).

SULLIVAN, J.P., BALLETTA, COPERTINO and SANTUCCI, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

STATE OF NEW YORK :
DEPARTMENT OF LABOR

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In the Matter of TAP ELECTRICAL CONTRACTING SERVICE, INC., Prime Contractor for the determination, pursuant to Article 8 of the Labor Law, whether prevailing wages and supplements were paid to or provided for laborers, workers and mechanics employed on a public work project for Lighting Replacement on the Northern State Parkway, County of Nassau, New York. (Contract No. D 500118).	:	*NOTICE OF FILING AND INDEX OF DECISIONS* Prevailing Rate Case No. 84-5971 (Nassau County)

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PLEASE TAKE NOTICE that annexed hereto is a true copy of an Order and Determination of the Commissioner of Labor, upon remand from the Supreme Court of the State of New York, Appellate Division : Second Judicial Department, which was duly filed in the Office of the Commissioner of Labor on February 15, 1991.

Any party aggrieved by this Order and Determination may commence a proceeding for the review thereof pursuant to Article 78 of the Civil Practice Law and Rules within thirty days from the notice of filing of the said Order and Determination in the office of the Commissioner of Labor.

Pursuant to the State Administrative Procedure Act, Section 307.3(a), the above-captioned case is indexed as follows:

SUBJECT: 1) Public Work;

2) Modifies October 31, 1989 Order and Determination, duly filed on November 8,

1989, in accordance with directions of the Supreme Court of the State of New York, Appellete [sic] Division : Second Judicial Department;

3) Non-ERISA supplement underpayments totalling $5,093,59 [sic] to thirty employees;

4) All other aspects of October 31, 1989 Order and Determination remain in full force and effect.

Dated: February 15, 1991
Brooklyn, New York

s/Barbara C Deinhardt
BARBARA C. DEINHARDT

Deputy Commissioner of Labor
for Legal Affairs and General
Counsel
New York State Department of
Labor
One Main Street, Room 1201
Brooklyn, New York 11201
Telephone (718) 797-7388

STATE OF NEW YORK :
DEPARTMENT OF LABOR

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In the Matter of TAP ELECTRICAL CONTRACTING SERVICE, INC., Prime Contractor, for the determination, pursuant to Article 8 of the Labor Law, whether prevailing wages and supplements were paid to or provided for laborers, workers and mechanics employed on a public work project for Lighting Replacement on the Northern State Parkway, County of Nassau, New York. (Contract No. D 500118).	*ORDER AND DETERMINATION* (On Remand from the Supreme Court of the State of New York Appellate Division : Second Judicial Department) Prevailing Rate Case No. 84-5971 (Nassau County)

----------x

This is a proceeding pursuant to Article 8 of the Labor Law to determine whether the prevailing rate of wages and supplements required by statute to be paid or provided to laborers, workers and mechanics employed on a public work project were paid to or provided for certain employees of TAP Electrical Contracting Service, Inc. (TAP) on a public work project for lighting replacement on the Northern State Parkway, County of Nassau, New York.

Upon the instructions of the Supreme Court of the State of New York, Appellate Division: Second Judicial Department, which specifically remitted the instant matter to the Department of Labor to compute the exact amount of non-ERISA (*i.e.* vacation and holiday, benefit fund and supplemental unemployment benefit) supplement underpayments, I have reviewed the entire record of this matter, including the September 25, 1990 submission of the Bureau of Public Work

(Bureau) by Barbara C. Deinhardt, Deputy Commissioner of Labor for Legal Affairs, Lisa F. Bleiberg, Associate Attorney (DOL Exs. #33a-dd, 34, 35), and the November 1, 1990 submission of TAP by Proskauer Rose Goetz & Mendelsohn, Stephen P. Kramer, Special Counsel (TAP Ex. L), and due deliberation having been had,

NOW, on the entire record of this matter, I make the following findings of fact:

1. TAP's supplement underpayments resulted from two factors: a) its utilization of an incorrect formula to compute the hourly cost equivalent for the "holiday" supplement it provided on behalf of its employees; and b) its crediting for benefits paid in an amount in excess of the applicable prevailing amount for the apprenticeship training supplement.

2. The underpayments resulting from the improper utilization of 1920, rather than 2080 hours, as the annual work year, resulted in TAP overcrediting its combined vacation and holiday supplement payments by approximately 0.21%.

3. TAP credited itself for benefits paid in excess of the applicable prevailing supplement rate for apprenticeship training and underpaid all other supplements by the amount it overcredited itself for the apprenticeship training supplement. To determine the amount of non-ERISA supplement underpayments, the Bureau of Public Work (Bureau) computed the percentage of TAP's total supplement payments attributable to non-ERISA supplements. The Bureau then multiplied this percentage by the underpayment, resulting in part from the overcrediting for apprenticeship, to get the amount of the non-ERISA supplement underpayments.

4. During the project, TAP made cash supplement payments for both ERISA and non-ERISA supplement deficiencies. Therefore, TAP's total cash adjustments have been applied as paid and not applied solely to non-ERISA supplement underpayments.

5. The Bureau made its computations of the underpayments as follows:

a. The difference between the amount TAP incorrectly computed for vacation and holiday *(i.e.* 8.71% for journey-level workers and 7.71% for apprentices and trainees) and its actual payment (*i.e.* 8.5% and 7.5%, respectively), was computed;

b. The total of the three non-ERISA supplement underpayments, as contained in DOL Ex. #29, was computed;

c. The vacation and holiday difference was subtracted from the non-ERISA supplement underpayment total;

d. To determine what percentage of the cash supplement payments made by TAP were attributable to the three non-ERISA supplements, the non-ERISA supplement underpayment total (after the vacation and holiday difference was subtracted) was divided by the total of all supplements (ERISA and non-ERISA) which TAP failed to pay (before any "adjustments" were made), as contained in DOL Ex. #29;

e. The vacation and holiday difference was subtracted from the supplement underpayment amount contained in my October 31, 1989 Order and Determination;

f. The resulting difference was multiplied by the previously determined percentage of cash supplement payments attributable to the three non-ERISA supplements (as determined in d. above), to arrive at the amount of non-ERISA supplement underpayments (exclusive of the vacation and holiday difference);

g. The vacation and holiday difference was added to the non-ERISA supplement underpayments (as determined in f. above), to arrive at the final underpayment computation.

6. The "interim policy" set forth in the February 8, 1990 memorandum from Deputy Commissioner of Labor for Legal Affairs, Barbara C. Deinhardt to Director, Bureau of Public Work, Charles C. Drobner, is inapplicable to the instant proceeding as it does not constitute a "pending matter", having been finally determined prior to February 8, 1990.

AND IT IS:

ORDERED that my October 31, 1989 Order and Determination, duly filed on November 8, 1989, is hereby modified to the extent that, I accept and adopt the revised computation of prevailing non-ERISA supplement underpayments submitted by the Bureau of Public Work on September 25, 1990 (DOL Ex. #33a-dd) and reject the computations submitted by TAP on November 1, 990 (TAP Ex. L);

DETERMINED that the non-ERISA supplement underpayments which were due and owing to employees of TAP are as follows:

EMPLOYEE	*AMOUNT OF NON-ERISA UNDERPAYMENT*
Frank Albrecht	$ 1.11
Andrew Bianco	51.59
Anthony Cardillo	11.28
Dennis Colantonio	107.90
Raymond Countryman	81.69
ThomasDiNapoli	4.53
Thomas Dziomba	8.15
Thomas Ferrari	2.86
William Finn	188.06
Brian Flaiz	535.80
Gary Harrington	367.32
James Healy	17.74
Michael Iovino	52.85
Barry Manzione	61.67
Francis Nolan	1.67
Andrew Padmore	225.80
Michael Raymond	106.75
William Winston	147.14
Michael Albani	1.29
James Benes	316.12
Vito Giacopelli	3.25
Mike James	6.25
Timothy Nordt	129.23
Michael Riccio	1.05

Edward Rogers	22.29
Stewart Roman	104.53
Anthony Sgambati	1.20
Daniel Coner	695.78
Joseph Vario	560.20
Anne Wynne	1,278.49
TOTAL:	$5,093.59;

ORDERED that interest at the rate of sixteen percent per annum is assessed on the non-ERISA supplement underpayments from the date such supplements should have been paid or provided to the date of payment, and TAP shall be given credit for all restitution previously made;

ORDERED that, except as herein modified, my October 31, 1989 Order and Determination, duly filed on November 8, 1989, shall remain in full force and effect.

DATED: Brooklyn, New York
February 6, 1991

s/Thomas F. Hartnett
THOMAS F. HARTNETT
Commissioner of Labor

76 NEW YORK REPORTS, 2d SERIES

Statement of Case

In the Matter of TAP ELECTRICAL CONTRACTING SERVICE, INC., Appellant-Respondent, v THOMAS F. HARTNETT, as Commissioner of Labor of the State of New York, Respondent-Appellant.

Argued May 2, 1990; decided June 5, 1990

SUMMARY

CROSS APPEALS, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered December 22, 1989, which, in a proceeding pursuant to CPLR article 78 (transferred to the Appellate Division by order of the Supreme Court, entered in Nassau County), (1) granted the petition to the extent of annulling so much of a final order and determination of respondent Commissioner of Labor of the State of New York as found that petitioner willfully violated Labor Law article 8 by underpaying prevailing wages and supplements to the three individuals it classified as "trainees", and by failing to pay or provide prevailing supplements with regard to pension, welfare, annuity and joint educational funds to or on behalf of 28 employees, (2) denied the petition in all other respects, and otherwise confirmed the determination and dismissed the proceeding, and (3) remitted the matter to respondent for computation of the amount of petitioner's underpayments of non-Employee Retirement Income Security Act supplements.

Matter of Tap Elec. Contr. Serv. v Hartnett, 156 AD2d 612, modified.

APPEARANCES:

Arnold I. Burns, Randy L. Levine, M. David Zurndorfer, Carole O'Blenes and *Neil H. Abramson* for appellant-respondent.

Robert Abrams, Attorney-General (Jennifer S. Brand, Jane Lauer Barker and *M. Patricia Smith* of counsel), for respondent-appellant.

Sanford E. Pollack and *Edward Quinlan* for Local 363 Benefits Funds and Building Industry Fund, *amicus curiae*.

K. Richard Marcus, Steven I. Levin and *Lorraine D'Angelo* for The Joint Industry Board of the Electrical Industry, *amicus curiae*.

OPINION OF THE COURT

Per Curiam.

The only argument preserved for our review in these cross-appeals is whether the holding in *Matter of Monarch Elec. Contr. Corp. v Roberts* (70 NY2d 91) applies to construction projects jointly funded by the State and Federal governments under the Federal-Aid Highway Act (23 USC § 101 *et seq.* [FAHA]).

In *Monarch* we reviewed the history and interpretation of Labor Law § 220 and held that it requires the classification of all employees on State-funded public work projects as either journeymen or apprentices and that to qualify as an apprentice under the statute an employee must be individually registered in a skills training program approved by the State Department of Labor. Trainees registered in programs of the United States Department of Labor may not be substituted by contractors and paid wages less than journey-level workers (Labor Law § 220 [3-e]).

[1] The Commissioner's ruling in this case was consistent with that decision but the Appellate Division annulled it because this project was jointly funded under the FAHA. We conclude, however, that Labor Law § 220, as interpreted in *Monarch*, applies not only to State-funded projects but also to jointly funded projects and is not preempted by Federal law.

Section 220 unambiguously authorizes only two categories of employees, journeymen and apprentices. The statute makes

no provision for a third category and nothing can be read into it to authorize employment of United States Department of Labor trainees on Federally funded projects. Nor can our decision in *Monarch* be construed to authorize the use of Federal trainees because it was not premised on funding. The source of moneys paid for the improvement affected neither the classification of employees, the corresponding wages required, nor any other policy identified by the statute or its legislative history.

Petitioner also contends that the statute is preempted by the Federal regulations on the subject since it conflicts with 23 CFR 230.107 (b) to such a degree that it stands as an obstacle to the accomplishment of the full purposes and objectives of the statute (*see, Hillsborough County v Automated Med. Labs.*, 471 US 707, 712-714). However, courts are reluctant to infer preemption from the comprehensive nature of Federal regulations in the absence of an express indication by Congress of an intent to do so *(see, Hillsborough County v Automated Med. Labs, supra*, at 717-718). This is particularly true as pertains to a regulation that does not specifically address the issue (*see, Siuslaw Concrete Constr. Co. v. State of Washington, Dept. of Transp.*, 784 F2d 952, 957 [9th Cir 1986]). Petitioner, noting the policy of FAHA is to "fully utilize" all available training and skill improvement opportunities for women and minority workers (23 CFR 230.107 [b]), contends that this policy is frustrated if the State may prevent contractors from using Federally trained employees. We disagree and find that petitioner's interpretation of the "full utilization" policy is inconsistent with the statutory scheme.

Neither the statute nor its implementing regulations require States to use trainees enrolled in programs administered by the United States Department of Labor. Indeed, 23 USC § 114 (a) provides that "construction work and labor in each State shall be performed under the direct supervision of the State highway department and in *accordance with the law of that State* and applicable Federal laws" (emphasis added). The regulations provide that States are permitted to establish

trainee programs, determine which Federal subsidized construction contracts shall include trainees and fix the number of trainees used on any particular project (23 CFR 230.111 [a]). The regulations also set forth criteria States shall consider when selecting trainee programs (23 CFR 230.111 [d]) and the Federal agency monitors projects to ensure that States comply with the FAHA affirmative action training goals and policies (23 CFR 230.111 [b]). Apart from these limitations, States have broad latitude to select from alternative trainee programs as long as they conform with the prevailing goals and restrictions set by the Commissioner (*see*, 23 CFR 230.111; *Siuslaw Concrete Constr. Co. v. State of Washington, Dept. of Transp., supra* [rejecting arguments that 23 CFR 230.111 (d) and (e) (1) limit the State agency's approval authority with respect to trainee programs]). Thus, the "full utilization" policy declaration (23 CFR 230.107 [b]) neither mandates that States use Federally trained workers nor constitutes a limitation upon the range of programs a State uses provided the State achieves its affirmative action training goal.

Petitioner also asserts that section 220 conflicts with the prevailing wage rate requirements of the Davis-Bacon Act (Act) (40 USC § 276a). Specifically, it claims that section 220 interferes with the FAHA's exemption for Federal trainees from the requirements of the Act (23 USC § 113[c]). That Act was intended to benefit employees by prescribing a minimum rate of wages on Government-subsidized projects (*see generally, United States v Binghamton Constr. Co.*, 347 US 171). It does not prohibit States from providing minimums on Federally funded projects that exceed the minimum wage prescribed by Federal law (*see, Siuslaw Concrete Constr. Co. v State of Washington, Dept. of Transp., supra; see also Matter of Green Is. Constr. Co. v Roberts*, 139 AD2d 907, 908). In any event, section 220 does not interfere with or obstruct the requirements of the Davis-Bacon Act or the FAHA exemption for trainees from that Act because it does not purport to raise the minimum wage paid to Federal trainees. It merely requires that State-registered trainees be hired instead of Federal trainees, thus determining that for State-subsidized projects New

York's participation in FAHA and its skills training obligations will be fulfilled by use of trainees registered under New York law. Petitioner was required to pay the three workers registered in Federal training programs journey-level wages because under section 220 they are not recognized as training level workers. Furthermore, it is irrelevant that section 220 may dissuade contractors from hiring Federal trainees on Federally funded projects, as petitioner contends, because contractors are not even permitted to use these workers in a trainee capacity under statute.

Accordingly, section 220 is not in conflict with or preempted by Federal Law.

[2] Finally, there is substantial evidence in the record to support the Commissioner's determination that petitioner willfully violated section 220 because it adhered to its own policy of hiring Federal trainees paid less than journey-level wages after it was expressly notified that it was not conforming to the Department's policy (*see, Matter of Hull-Hazard, Inc. v Roberts*, 74 NY2d 710; *Matter of Roze Assocs. v Department of Labor*, 143 AD2d 510).

Accordingly, the order of the Appellate Division should be modified, with costs to respondent-appellant Commissioner, by reinstating the determination of the Commissioner of Labor insofar as it concluded that petitioner willfully violated Labor Law article 8 by underpaying prevailing wages and supplements to the three individuals it classified as "trainees", and, as so modified, affirmed.

Chief Judge WACHTLER and Judges SIMONS, ALEXANDER, TITONE, HANCOCK, JR., and BELLACOSA concur in Per Curiam opinion; Judge KAYE taking no part.

Order modified, with costs to respondent-appellant Commissioner of Labor, in accordance with the opinion herein and, as so modified, affirmed.

STATE OF NEW YORK,

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth ***day of*** February A.D. 1990

PRESENT, HON. SOL WACHTLER, *Chief Judge, presiding.*

2-14 Mo. No. 57
In the Matter of Tap Electrical Contracting Service, Inc., &c.,
Appellant,

v.

Thomas F. Hartnett, as Commissioner of Labor of the State of New York,
Respondent.

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeal taken as of right be and the same hereby is dismissed, without costs, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution; and it is

ORDERED, that the said motion for leave to appeal be and the same hereby is granted; and it is

ORDERED, that the said motion for a stay be and the same hereby is denied.

Judge Kaye took no part.

s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK,

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth *day of* February *A.D. 19* 90

PRESENT, HON. SOL WACHTLER, *Chief Judge, presiding.*

Mo. No. 101
In the Matter of Tap Electrical Contracting Service, Inc., &c.,
Respondent,
v.
Thomas F. Hartnett, as Commissioner of Labor of the State of New York,
Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeal taken as of right be and the same hereby is dismissed, without costs, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution; and it is

ORDERED, that the said motion for leave to appeal be and the same hereby is granted.

Judge Kaye took no part.

/s/ Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

In the Matter of TAP ELECTRICAL CONTRACTING SERVICE, INC., Appellant, v THOMAS F. HARTNETT, as Commissioner of Labor of the State of New York, Respondent. — Proceeding pursuant to CPLR article 78 to review a final order and determination of the respondent Thomas F. Hartnett, Commissioner of Labor of the State of New York, dated October 31, 1989, which, after a hearing, found the petitioner in willful violation of Labor Law article 8 and, *inter alia*, barred it from bidding on or being awarded any New York State public work contract for a period of five years pursuant to Labor Law § 220-b (3) (b).

Adjudged that the petition is granted, on the law, without costs or disbursements, to the extent of annulling so much of the final order and determination as determined that the petitioner willfully violated Labor Law article 8 by (1) underpaying prevailing wages and supplements to the three individuals it classified as "trainees", and (2) failing to pay or provide prevailing supplements with regard to pension, welfare, annuity and joint educational funds to or on behalf of 28 employees; the petition is denied in all other respects and the determination is otherwise confirmed, the proceeding is otherwise dismissed and the matter is remitted to the respondent for the computation of the amount of the petitioner's underpayments of non-ERISA supplements in accordance herewith.

The petitioner entered into a $2,753,799.93 contract with the New York State Department of Transportation on January 18, 1985 to replace lighting on a 12.75-mile section of the Northern State Parkway. The project was funded by both the Federal and State Governments. An investigation by the New York State Department of Labor led to charges being brought against the petitioner alleging, *inter alia*, that it willfully violated Labor Law § 220 by (1) underpaying prevailing wages and supplements to three individuals who the petitioner erroneously classified as "trainees"; (2) failing to pay prevailing supplements, including vacation and holiday supplements, to or on behalf of 28 other employees; and (3) employing an excessive number of apprentices in violation of the applicable

apprentice ratio as required by the prevailing wage schedule in the contract. In his report and recommendation dated July 25, 1989, the Hearing Officer found that all of the charges had been substantiated except the allegation that the petitioner had violated the applicable apprentice ratio. By order and determination dated October 31, 1989, the respondent Commissioner adopted the Hearing Officer's report and recommendation except as to his finding regarding the violation of the apprentice ratio. On that issue, the Commissioner determined that the petitioner had in fact violated the ratio. The Commissioner further determined that each of the aforesaid violations was willful. Because this final determination of willful violations by the petitioner was the second such determination rendered against the petitioner within a period of six years, the Commissioner, pursuant to Labor Law § 220-b (3) (b), barred the petitioner from bidding on or being awarded any public work contract for five years. Moreover, the Commissioner directed the petitioner to pay its employees for the underpayment of wages and supplements plus interest and imposed a civil penalty.

The petitioner maintains that the Employee Retirement Income Security Act of 1974 (hereinafter ERISA; 29 USC § 1001 *et seq.*) preempts the New York State Labor Law and that, in any event, the Commissioner's findings that the petitioner willfully violated the Labor Law are not substantiated by the record. Although we agree with the petitioner that the Commissioner's application of the Labor Law to some of the charges lodged against the petitioner was improper, we conclude that the State statute has not been preempted with regard to the underpayment of vacation and holiday benefits. Since the record supports the Commissioner's determination that the petitioner violated Labor Law article 8 by underpaying these benefits and that such violation was willful, the petitioner was properly barred from bidding on or being awarded any public work contract in light of the fact that this was the second such final determination rendered against it within six years.

ERISA preempts "any and all State laws insofar as they * * * relate to any employee benefit plan" (29 USC § 1144

[a]). An "employee welfare benefit plan" is defined as: "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs" (29 USC § 1002 [1]; *Massachusetts v Morash*, 490 US __, 109 S Ct 1668).

The United States Supreme Court has held that: "[t]he reference to vacation payments in [29 USC § 1002] should be understood to include within the scope of ERISA those vacation benefit funds, analogous to other welfare benefits, in which either the employee's right to a benefit is contingent upon some future occurrence or the employee bears a risk different from his ordinary employment risk. It is unlikely that Congress intended to subject to ERISA's reporting and disclosure requirements those vacation benefits which by their nature are payable on a regular basis from the general assets of the employer and are accumulated over time only at the election of the employee" (*Massachusetts v Morash, supra*, at __, at 1673).

Since the petitioner did not provide its employees with vacation and holiday supplements through a plan but rather, paid them through its payroll, ERISA does not preclude the application of the New York State Labor Law to regulate the rate of such payments *(see, Massachusetts v Morash, supra; see also, General Elec. Co. v. New York State Dept. of Labor*, 891 F2d 25). We further find that there is substantial evidence in the record to support the Commissioner's determination that the petitioner willfully underpaid the prevailing vacation and holiday rate since the company conceded that it utilized an incorrect formula to compute the rate of pay and because it improperly credited itself for benefits paid over the prevailing supplement for apprenticeship benefits.

We agree with the petitioner, however, that several of its supplement plans were covered and governed by ERISA,

namely, the welfare, pension, annuity and joint educational funds, and that the matter must therefore be remitted to the Department of Labor to compute the exact amount of non-ERISA supplement underpayments *(Massachusetts v Morash, supra; General Elec. Co. v New York State Dept. of Labor, supra)*. In this regard, we note that we are in agreement with the petitioner's assertion that its use of Federal trainees on this Federally funded project was proper and, thus, the Commissioner's finding that the petitioner willfully violated Labor Law article 8 by employing "trainees" must be annulled (*cf., Matter of Monarch Elec. Contr. Corp. v Roberts*, 70 NY2d 91; *Matter of Tap Elec. Contr. Serv. v Roberts*, 133 AD2d 1017; *but see, Siuslaw Concrete Constr. Co. v State of Wash., Dept. of Transp.*, 784 F2d 952). Additionally, with respect to the petitioner's challenge to the Commissioner's finding that it violated the applicable apprentice ratio, we note that this violation did not, and could not, constitute a basis for the petitioner's debarment (*see*, Labor Law § 220-b [3] [b]). Moreover, no civil penalty was imposed upon the petitioner based on this finding.

Although we conclude that certain of the Commissioner's findings of a willful violation of Labor Law article 8 did not provide a proper basis for his final order and determination of a willful violation pursuant to Labor Law § 220-b (3) (b), we reject the petitioner's claim that the final order and determination must be annulled in its entirety. As stated previously, we find that the Commissioner properly concluded that the petitioner willfully failed to pay the prevailing supplements for vacations and holidays in violation of Labor Law article 8. Accordingly, the Commissioner's final order and determination with regard to these matters must be sustained and, since this is the petitioner's second final order and determination of a willful violation pursuant to Labor Law § 220-b (3) (b) within a consecutive six-year period, debarment is mandatory.

We have considered the petitioner's remaining contentions and find them to be without merit. Mollen, P. J., Mangano, Thompson, Bracken and Brown, JJ., concur.

STATE OF NEW YORK :
DEPARTMENT OF LABOR

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In the Matter of TAP ELECTRICAL CONTRACTING SERVICE, INC., Prime Contractor for the determination, pursuant to Article 8 of the Labor Law, whether prevailing wages and supplements were paid to, or provided for laborers, workers and mechanics employed on a public work project for Lighting Replacement of the Northern State Parkway, County of Nassau, New York. (Contract No. D 500118).	:	*NOTICE OF FILING AND INDEX OF DECISIONS* Prevailing Rate Case No. 84-5971 (Nassau County)

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PLEASE TAKE NOTICE that annexed hereto is a true copy of an Order and Determination of the Commissioner of Labor which was duly filed in the Office of the Commissioner of Labor on November 8, 1989.

Any party aggrieved by this Order and Determination may commence a proceeding for the review thereof pursuant to Article 78 of the Civil Practice Law and Rules within thirty days from the notice of filing of the said Order and Determination in the office of the Commissioner of Labor.

Pursuant to the State Administrative Procedure Act, Section 307.3(a), the above-captioned case is indexed as follows:

SUBJECT: 1) Public Work;

2) Report and Recommendation of Hearing Officer - prevailing wage and supplement underpayments by TAP Electrical Contracting Service, Inc. totalling $33,238.43 to twenty-eight employees;

3) Wilful violation by TAP Electrical Contracting Service, Inc.;

4) Sixteen percent interest ($15,019.90);

5) Twenty-five percent civil penalty against TAP Electrical Contracting Service, Inc. ($8,309.00).

Dated: November 8, 1989
Brooklyn, New York

s/Barbara C. Deinhardt
BARBARA C. DEINHARDT

Deputy Commissioner of Labor
for Legal Affairs and General
Counsel
New York State Department of
Labor
One Main Street, Room 1201
Brooklyn, New York 11201
Telephone (718) 797-7388

STATE OF NEW YORK:
DEPARTMENT OF LABOR

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In the Matter of TAP ELECTRICAL CONTRACTING SERVICE, INC., Prime Contractor for the determination, pursuant to Article 8 of the Labor Law, whether prevailing wages and supplements were paid to or provided for the laborers, workers and mechanics employed on a public work project for Lighting Replacement on the Northern State Parkway, County of Nassau, New York. (Contract No. D 500118).	:	*ORDER AND DETER-MINATION* Prevailing Rate Case No. 84-5971 (Nassau County)

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This is a proceeding pursuant to Article 8 of the Labor Law to determine whether the prevailing rate of wages and supplements required by statute to be paid or provided to laborers, workers and mechanics employed on a public work project were paid to or provided for certain employees of TAP Electrical Contracting Service, Inc. (TAP) on a public work project for lighting replacement on the Northern State Parkway, Nassau County, New York.

Pursuant to my designation, Eugene P. Myers and Florio A. Vitullo, Assistant Commissioners of Labor, as Hearing Officers, conducted a hearing in this matter on December 8, 9, 1987, March 30, November 29, 1988 and March 7, 1989, at the offices of the New York State Department of Labor, 175 Fulton Avenue, Hempstead, New York, and Florio A. Vitullo has submitted his Report and Recommendation, a copy of which is annexed hereto and made a part hereof.

On reading the Hearing Officer's Report and Recommendation, the transcripts of the hearing testimony, together with

the exhibits submitted in evidence, and due deliberation having been had,

NOW, on the entire record of this matter, it is:

ORDERED that the Report and Recommendation of the Hearing Officer be, and hereby is confirmed and adopted, except for the finding on page 28 that "TAP did *not* violate the apprentice/ratio as required by the Prevailing Wage Schedule in the Contract Document" and, instead, I find that TAP did violate the 1:1, 1:3 apprentice/journey-level ratio on the following dates, even if the trainees utilized by TAP are counted as journey-level workers for ratio purposes, and such violation is wilful:

December 27, 1985	-	9 journey-level
		4 apprentices
February 6, 1986	-	11 journey-level
		5 apprentices
March 11, 1986	-	8 journey-level
		4 apprentices
March 13, 1986	-	7 journey-level
		4 apprentices
March 17-21, 1986	-	8 journey-level
		4 apprentices
March 24-25, 1986	-	8 journey-level
		4 apprentices
March 26-27, 1986	-	7 journey-level
		4 apprentices
March 28, 1986	-	8 journey-level
		4 apprentices

March 31, 1986	-	6 journey-level
		4 apprentices
April 1-3, 1986	-	8 journey-level
		4 apprentices
April 4, 1986	-	7 journey-level
		4 apprentices
April 10-11, 1986	-	8 journey-level
		4 apprentices
April 14, 1986	-	7 journey-level
		4 apprentices
April 15-17, 1986	-	8 journey-level
		4 apprentices
April 21, 1986	-	7 journey-level
		4 apprentices
April 22-23, 1986	-	8 journey-level
		4 apprentices
April 24, 1986	-	7 journey-level
		4 apprentices
April 25, 1986	-	8 journey-level
		4 apprentices
April 28-29, 1986	-	8 journey-level
		4 apprentices
May 5-7, 1986	-	9 journey-level
		4 apprentices

May 12-13, 1986	-	9 journey-level
		4 apprentices
May 19, 1986	-	8 journey-level
		4 apprentices
May 20, 1986	-	9 journey-level
		4 apprentices
May 23, 1986	-	9 journey-level
		4 apprentices
June 4, 1986	-	9 journey-level
		4 apprentices
July 14-17, 1986	-	4 journey-level
		3 apprentices
July 18, 1986	-	3 journey-level
		2 apprentices
July 25, 1986	-	6 journey-level
		3 apprentices
July 28, 1986	-	3 journey-level
		2 apprentices
September 9, 1986	-	3 journey-level
		2 apprentices
September 22, 1986	-	3 journey-level
		2 apprentices
September 26, 1986	-	3 journey-level
		2 apprentices

December 29-30, 1986 - 3 journey-level

2 apprentices;

and it is

DETERMINED that the unpaid wages and supplements due and owing to the employees of TAP are due and owing because of TAP's failure to pay the prevailing wage and to pay or provide the prevailing supplements applicable to the project;

DETERMINED that the amounts which were due and owing to employees of TAP are as follows:

EMPLOYEE	*AMOUNT OF UNDERPAYMENT*
Frank Albrecht	$ 4.34
Andrew Bianco	170.65
Anthony Cardillo	51.28
Dennis Colantonio	289.44
Raymond Countryman	310.31
Thomas DiNapoli	7.76
Thomas Dziomba	8.15
Thomas Ferrari	10.99
William Finn	711.34
Brian Flaiz	2,469.65
Gary Harrington	1,659.86
James Healy	76.27
Michael Iovino	209.61
Barry Manzione	185.07
Francis Nolan	2.59
Andrew Padmore	925.67
William Winston	344.37
Michael Albani	3.25
James Benes	1,027.93
Vito Giacopelli	15.66
Arthur Masucci, Jr.	0.00
Timothy Nordt	320.76
Michael Riccio	2.60
Edward Rogers	61.61

Stewart Roman	304.70
Anthony Sgambati	3.27
Daniel Coner	5,958.14
Joseph Vario	5,902.41
Ann Wynne	11,694.99
TOTAL:	$33,238.43;

DETERMINED that, on or about August 23, 1988, TAP authorized the Bureau of Public Work of the New York State Department of Labor to make the following payments as partial restitution, from funds being withheld on the Contract:

EMPLOYEE	*PAYMENT AUTHORIZED*
Frank Albrecht	$ 0.15
Anthony Cardillo	10.66
Brian Flaiz	1,322.41
Gary Harrington	778.95
James Healy	47.48
Michael Iovino	41.18
Andrew Padmore	158.24
Michael Albani	0.02
James Benes	398.25
Vito Giacopelli	0.17
Michael James	12.49
Michael Riccio	1.21
Edward Rogers	3.23
Stewart Roman	31.16
Daniel Coner	5,555.09
Joseph Vario	5,785.65
Ann Wynne	11,641.54
TOTAL:	$25,787.88;

ORDERED that interest at the rate of sixteen percent per annum is assessed on the underpayments from the date such wages and supplements were due to the date of payment;

DETERMINED that TAP owes interest, as follows, on the moneys previously restituted, said interest computed to August 23, 1988:

EMPLOYEE	*INTEREST DUE ON PARTIAL RESTITUTION*
Anthony Cardillo	$ 3.41
Brian Flaiz	493.70
Gary Harrington	296.00
James Healy	21.52
Michael Iovino	15.65
Andrew Padmore	63.82
James Benes	148.68
Michael James	5.99
Michael Riccio	.52
Edward Rogers	1.19
Stewart Roman	11.53
Daniel Coner	2,055.38
Joseph Vario	2,468.54
Ann Wynne	5,122.28
TOTAL:	$10,708.21;

DETERMINED that the amounts still due and owing to employees of TAP are as follows (interest computed to November 30, 1989):

EMPLOYEE	*OUTSTAND-ING AMOUNT*	*INTEREST DUE ON OUSTAND-ING AMOUNT*	*INTEREST DUE ON PARTIAL RESTITU-TION*	*TOTAL DUE*
Frank Albrecht	$ 4.34	$ 2.72	$ 0.00	$ 7.06
Andrew Bianco	170.65	97.84	0.00	268.49
Anthony Cardillo	40.62	21.12	3.41	65.15
Dennis Colantonio	289.44	173.66	0.00	463.10
Raymond Countryman	310.31	182.05	0.00	492.36
Thomas DiNapoli	7.76	3.52	0.00	11.78
Thomas Dziomba	8.15	4.02	0.00	12.17
Thomas Ferrari	10.99	6.59	0.00	17.58
William Firn	711.34	379.38	0.00	1,090.72
Brian Flaiz	1,147.24	657.75	493.70	2,298.69
Gary Harrington	880.91	528.55	296.00	1,705.46
James Healy	28.79	18.42	21.52	68.73
Michael Iovino	168.43	101.06	15.65	285.14
Barry Manzione	185.07	108.57	0.00	293.64
Francis Nolan	2.59	1.79	0.00	4.38
Andrew Padmore	767.43	439.99	63.82	1,271.24
Michael Raymond	344.37	197.44	0.00	541.81
William Winston	497.51	305.14	0.00	802.65
Michael Albani	3.25	1.99	0.00	5.24
James Benes	629.68	361.02	148.68	1,139.38
Vito Giacopelli	8.25	5.06	0.00	13.31
Michael James	3.17	2.15	5.99	11.31
Timothy Nordt	320.76	183.90	0.00	504.66
Michael Riccio	1.39	0.85	0.52	2.76
Edward Rogers	58.38	33.47	1.19	93.04
Stewart Roman	273.54	153.18	11.53	438.25
Anthony Sgambati	3.27	2.00	0.00	5.27
Daniel Coner	403.05	231.08	2,055.38	2,689.51
Joseph Vario	116.76	73.17	2,468.54	2,658.47
Ann Wynne	53.45	34.21	5,122.28	5,209.94;

DETERMINED that TAP's underpayment of prevailing wages and supplements to the three individuals it classified as

"trainees" on the project was a wilful violation of Article 8 of the Labor Law;

DETERMINED that TAP's failure to pay or provide prevailing supplements to or on behalf of twenty-eight employees on the project was a wilful violation of Article 8 of the Labor Law;

DETERMINED that TAP's excessive use of apprentices on the project, in violation of the applicable journey-level/apprentice ratio, was a wilful violation of Article 8 of the Labor Law;

ORDERED that the aforementioned wilful violations shall constitute one final wilful determination within the meaning of Section 220-b(3) (b) of the Labor Law which provides that where a contractor or subcontractor and/or its successor is determined to have wilfully failed to pay prevailing wages or to provide supplements in two instances in a six-year period, such contractor or subcontractor and/or its successor shall be ineligible to bid on or be awarded any public work contract with the state, any municipal corporation or public body for a period of five years from the second final determination;

ORDERED that a civil penalty on the amount of $8,309.00, approximately twenty-five percent of the underpaid wages and supplements, is assessed against TAP;

ORDERED that, upon notification by the Bureau of Public Work, the State of New York, Department of Audit and Control (Conptroller [sic]) shall issue a check payable to the Commissioner of Labor in the amounts of the underpayments, interest and civil penalty assessed, as provided herein, charge such check to the funds directed withheld from moneys due TAP pursuant to Contract No. D500118 and forward such check to the Bureau of Public Work, Department of Labor, 175 Fulton Avenue, Hempstead, New York 11550, for distribution to the payees;

ORDERED that, upon notification by the Bureau of Public Work, TAP shall issue a check payable to the Commissioner of Labor in the amounts of any underpayments, interest and

civil penalty not satisfied from moneys withheld by the Comptroller and forward such check to the Bureau of Public Work, Department of Labor, 175 Fulton Avenue, Hempstead, New York 11550, for distribution to the payees; and it is further

ORDERED that, in the event the wages and supplements due, interest thereon and the civil penalty assessed are not satisfied in full by TAP within fifteen days following the receipt of a demand for payment, and no petition has been filed for review of this Order and Determination, said Order and Determination may be filed with the County Clerk where the employer resides or has a place of business, and the Clerk shall enter judgment pursuant to Section 220.8 and 220-b(2) of the New York State Labor Law in the total amount due and owing and that execution thereon may be issued to the Sheriff without further notice.

DATED: Brooklyn, New York
October 31, 1989

s/Thomas F. Hartnett
THOMAS F. HARTNETT
Commissioner of Labor

SUPREME COURT – STATE OF NEW YORK

SHORT FORM ORDER

Present: HON. ELI WAGER Justice.

In the Matter of the Application of	TRIAL/IAS, PART X NASSAU COUNTY
TAP ELECTRICAL CONTRACTING SERVICE, INC., PRIME CONTRACTOR Petitioner	INDEX NUMBER 21830, 1989
For a Judgment pursuant to Article 78 of Civil Practice Law and Rules - against -	MOTION DATE November 22, 1989
THOMAS F. HARTNETT, as Commissioner of Labor of the State of New York Respondent	CHAMBERS NUMBER SP-2858 TRIAL CAL. NUMBER

The following papers read on this motion to annul order and determination

Order to Show Cause . . . 1.

Answering Affidavits . . . 2.

Replying Affidavits

Pleadings, Exhibits, Stipulation

Briefs: Plaintiff's/Petitioner's Defendant's/Respondent's . .

APPENDIX B

THE SUPREMACY CLAUSE, U.S. Const. art. VI, provides:

ARTICLE VI

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

ERISA §§ 3(1), (3), 514 (a), (c), (d), 29 U.S.C. § 1002(1), (3), 1144 (a), (c), (d) provide:

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

* * *

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

* * *

(c) Definitions

For purposes of this section:

> **(1)** The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.
>
> **(2)** The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

TAFT-HARTLEY ACT § 302(c), 29 U.S.C. § 186(c), provides in pertinent part:

§ 186. Restrictions on financial transactions

(c) Exceptions

The provisions of this section shall not be applicable

(6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; . . .

(5) *Provided*, That... (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement;

N.Y. LABOR LAW §§ 220 (3), (3-e), (5)-(9), 220-b(3)(b), provide in pertinent part:

ARTICLE 8—PUBLIC WORK

§ 220. Hours, wages and supplements

3. The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon such public works, shall be not less than the prevailing rate of wages as hereinafter defined. Serving laborers, helpers, assistants and apprentices shall not be classified as common labor and shall be paid not less than the prevailing rate of wages as hereinafter defined. No employee shall be deemed to be an apprentice unless he is individually registered in an apprenticeship program which is duly registered with the commissioner of labor in conformity with the provisions of article twenty-three of this chapter. The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall be not less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about or in connection with which such labor is performed in its final or completed form is to be situated, erected or used. Such contracts shall contain a provision that each laborer, workman or mechanic, employed by such contractor, subcontractor or other person about or upon such public work, shall be paid the wages herein provided.

The supplements, as hereinafter defined, to be provided to laborers, workmen or mechanics upon such public works, shall be in accordance with the prevailing practices in the locality, as hereinafter defined. Serving laborers, helpers, assistants and apprentices shall not be classified as common labor and shall be provided supplements in accordance with the prevailing practices as hereinafter defined. No employee shall be deemed to be an apprentice unless he is individually registered in an apprenticeship program which is duly registered with the industrial commissioner[1] in conformity with the provisions of article twenty-three of this chapter. The supplements, as

hereinafter defined, to be provided to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall be in accordance with the prevailing practices in the same trade or occupation in the locality within the state where such public work on, about or in connection with which such labor is performed in its final or completed form is to be situated, erected or used. Such contracts shall contain a provision that each laborer, workman or mechanic, employed by such contractor, subcontractor or other person about or upon such public work, shall be provided the supplements as required in this article.

It shall be the duty of the fiscal officer, as defined in this section, to ascertain and determine the schedules of supplements to be provided and wages to be paid workmen, laborers and mechanics on such public work, prior to the time of the advertisement for bids, and such schedules shall be annexed to and form a part of the specifications for the work. Such fiscal officer shall file with the department having jurisdiction such schedules to the time of the commencement of the advertisement for bids on all public works proposed to be constructed.

Any person or corporation that wilfully pays or provides after entering into such contract, less than such stipulated wage scale or supplements as established by the fiscal officer shall be guilty of a misdemeanor and upon conviction shall be punished for such first offense by a fine of five hundred dollars or by imprisonment for not more than thirty days, or both fine and imprisonment; for a second offense by a fine of one thousand dollars, and in addition thereto the contract on which the violation has occurred shall be forfeited; and no such person or corporation shall be entitled to receive any sum ... for work done upon any contract, on which the contractor has been convicted for second offense in violation of the provisions of this section.

* * *

3–e. Apprentices will be permitted to work as such only when they are registered, individually, under a bona fide

program registered with the New York State Department of Labor. The allowable ratio of apprentices to journeymen in any craft classification shall not be greater than the ratio permitted to the contractor as to his work force on any job under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not registered as above, shall be paid the wage rate determined by the New York State Department of Labor for the classification of work he actually performed. The contractor or subcontractor will be required to furnish written evidence of the registration of his program and apprentices as well as of the appropriate ratios and wage rates, for the area of construction prior to using any apprentices on the contract work.

* * *

5. Definitions. a. The "prevailing rate of wage," for the intents and purposes of this article, shall be the rate of wage paid in the locality, as hereinafter defined, by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed. The prevailing rate of wage shall be annually determined in accordance herewith by the fiscal officer no later than thirty days prior to July first of each year, and the prevailing rate of wage for the period commencing July first of such year through June thirtieth, inclusive. . .

b. "Supplements," for the intents and purposes of this article, means all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not "wages" within the meaning of the law, including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay[1] life insurance, and apprenticeship training.

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[1] So in original. A comma should probably be inserted.

c. "Prevailing practices in the locality," for the intents and purposes of this article, shall be the practice of providing supplements, as hereinbefore defined, as provided by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality, as determined by the fiscal officer in accordance with the provisions herein.

With respect to each supplement determined to be one of the prevailing practices in the locality, the amount of such supplement shall be determined in the same manner and at the same times as the prevailing rate of wage is determined pursuant to this section.

d. "Locality" means such areas of the state described and defined for a trade or occupation in the current collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public and private work.

* * *

6. The fiscal officer, may, and on the written request of any interested person shall, require any person or corporation performing such public work to file with such fiscal officer schedules of the supplements to be provided and wages to be paid to such laborers, workmen or mechanics. . .

7. Compliance investigations. The fiscal officer as herein defined shall on a verified complaint in writing of any person interested or of any employee organization pursuant to subdivision eight-d, and may on his own initiative cause a compliance investigation to be made to determine whether the contractor or a subcontractor has paid the prevailing rate of wages and prevailing practices for supplements in the same trade or occupation in the locality within the state where such public work is being performed. . . The fiscal officer or his agents, examiners and inspectors may examine or cause to be examined the books and records pertaining to the rate of

wages paid and supplements provided to the laborers, workmen and mechanics on said public work and the hours of labor performed by such laborers, workmen and mechanics on said public work. The fiscal officer in such investigation shall be deemed to be acting in a judicial capacity, and shall have the right to issue subpoenas, administer oaths and examine witnesses. . .

8. Hearings. Before issuing an order or determination as provided in subdivision seven, the fiscal officer shall order a hearing thereon at a time and place to be specified, and shall give notice thereof, together with a copy of such complaint or the purpose thereof, or a statement of the facts disclosed upon such investigation, which notice shall be served personally or by mail on any person or corporation affected thereby; such person or corporation shall have an opportunity to be heard in respect to the matters complained of at the time and place specified in such notice, which time shall be not less than five days from the service of the notice personally or by mail. The fiscal officer in such hearing shall be deemed to be acting in a judicial capacity, and shall have the right to issue subpoenas, administer oaths and examine witnesses.

* * *

In addition to directing payment of wages or supplements including interest found to be due, such order may direct payment of a further sum as a civil penalty in an amount not exceeding twenty-five percent of the total amount found to be due.

* * *

9. When a final determination has been rendered, any person, or corporation that wilfully refuses thereafter to pay the rate of wages or to provide the supplements determined to be prevailing, or wilfully employs on such public work, laborers, workmen or mechanics more than the hours per day determined by said order until modified by order of the fiscal officer or court and thereby violates the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be

punished, for a first offense by a fine of five hundred dollars or by imprisonment for not more than thirty days, or by both such fine and imprisonment; for a second offense by a fine of one thousand dollars, and in addition thereto the contract on which the violation has occurred shall be forfeited; and no such person or corporation shall be entitled to receive any sum... for work done upon any contract, on which the contractor has been convicted of second offense in violation of the provisions of this section.

§ 220-b. Amounts due for wages and supplements may be withheld for benefit of laborers

3. b. When two final determinations have been rendered against a contractor or subcontractor and/or its successor within any consecutive six-year period determining that such contractor or subcontractor and/or its successor has wilfully failed to pay the prevailing rate of wages or to provide supplements in accordance with this article, whether such failures were concurrent or consecutive and whether or not such final determinations concerning separate public work projects are rendered simultaneously, such contractor or subcontractor and/or its successor shall be ineligible to submit a bid on or be awarded any public work contract or subcontract with the state, any municipal corporation or public body for a period of five years from the second final determination, provided, however, that where any such final determination involves the falsification of payroll records or the kickback of wages or supplements, the contractor or subcontractor and/or its successor shall be ineligible to submit a bid on or be awarded any public work contract with the state, any municipal corporation or public body for a period of five years from the first final determination. For purposes of this article, a successor shall mean an employer engaged in work substantially similar to that of the predecessor, where there is substantial continuity of operation with that of the predecessor.

FEDERAL-AID HIGHWAYS ACT ("FAHA") §§ 113, 140(a)-(c), 315, 23 U.S.C. §§ 113, 140 (a)-(c), 315 provide:

§ 113. Prevailing rate of wage

(a) The Secretary shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors on the construction work performed on highway projects on the Federal-aid highways authorized under the highway laws providing for the expenditure of Federal funds upon the Federal-aid systems, shall be paid wages at rates not less than those prevailing on the same type of work on similar construction in the immediate locality as determined by the Secretary of Labor in accordance with the Act of March 3, 1931, known as the Davis-Bacon Act (40 U.S.C. 276a).

(b) In carrying out the duties of subsection (a) of this section, the Secretary of Labor shall consult with the highway department of the State in which a project on any of the Federal-aid systems is to be performed. After giving due regard to the information thus obtained, he shall make a predetermination of the minimum wages to be paid laborers and mechanics in accordance with the provisions of subsection (a) of this section which shall be set out in each project advertisement for bids and in each bid proposal form and shall be made a part of the contract covering the project.

(c) The provisions of the section shall not be applicable to employment pursuant to apprenticeship and skill training programs which have been certified by the Secretary of Transportation as promoting equal employment opportunity in connection with Federal-aid highway construction programs.

§ 140. Nondiscrimination

(a) Prior to approving any programs for projects as provided for in subsection (a) of section 105 of this title, the Secretary shall require assurances from any State desiring to avail itself of the benefits of this chapter that employment in connection with proposed projects will be provided without

regard to race, color, creed, national origin, or sex. He shall require that each State shall include in the advertised specifications, notification of the specific equal employment opportunity responsibilities of the successful bidder. In approving programs for projects on any of the Federal-aid systems, the Secretary shall, where he considers it necessary to assure equal employment opportunity, require certification by any State desiring to avail itself of the benefits of this chapter that there are in existence and available on a regional, statewide, or local basis, apprenticeship, skill improvement or other upgrading programs, registered with the Department of Labor or the appropriate State agency, if any which provide equal opportunity for training and employment without regard to race, color, creed, national origin, or sex. . . .

(b) The Secretary, in cooperation with any other department or agency of the Government, State agency, authority, association, institution, Indian tribal government, corporation (profit or nonprofit), or any other organization or person, is authorized to develop, conduct and administer highway construction training, including skill improvement programs. . . .

(c) The Secretary, in cooperation with any other department or agency of the Government, State agency, authority, association, institution, Indian tribal government, corporation (profit or nonprofit), or any other organization or person, is authorized to develop, conduct, and administer training programs and assistance programs in connection with any program under this title in order that minority businesses may achieve proficiency to compete, on an equal basis, for contracts and subcontracts. . . .

§ 315. Rules, regulations, and recommendations

Except as provided in sections 204(f) and 205(a) of this title, the Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this title. The Secretary may make such recommendations to the Congress and State highway departments as he deems necessary for preserving and protecting the highways and insuring the safety of traffic thereon.

REGULATIONS PURSUANT TO FAHA, 23 C.F.R. § 230.107-.113 and Part 230, Appendix B of Subpart A, provide in pertinent part:

§ 230.107 Policy.

(a) *Direct Federal and Federal-aid highway construction projects.* It is the policy of the FHWA to require that all direct Federal and Federal-aid highway construction contracts include the same specific equal employment opportunity requirements. It is also the policy to require that all direct Federal and Federal-aid highway construction subcontracts of $10,000 or more (not including contracts for supplying materials) include these same requirements.

(b) *Federal-aid highway construction projects.* It is the policy of the FHWA to require full utilization of all available training and skill-improvement opportunities to assure the increased participation of minority groups and disadvantaged persons and women in all phases of the highway construction industry. Moreover, it is the policy of the Federal Highway Administration to encourage the provision of supportive services which will increase the effectiveness of approved on-the-job training programs conducted in connection with Federal-aid highway construction projects.

§ 230.109 Implementation of specific Equal Employment Opportunity requirements.

(a) *Federal-aid highway construction projects.* The special provisions set forth in appendix A shall be included in the advertised bidding proposal and made part of the contract for each contract and each covered Federal-aid highway construction sub-contract.

* * *

§ 230.111 Implementation of special requirements for the provision of on-the-job training.

(a) The State highway agency shall determine which Federal-aid highway construction contracts shall include the

"Training Special Provisions" (appendix B) and the minimum number of trainees to be specified therein after giving appropriate consideration to the guidelines set forth in § 230.111(c). The "Training Special Provisions" shall supersede section 7(b) of the Special Provisions (appendix A) entitled "Specific Equal Employment Opportunity Responsibilities." Minor wording revisions will be required to the "Training Special Provisions" in areas having "Hometown" or "Imposed Plan" requirements.

(b) The Washington Headquarters shall establish and publish annually suggested minimum training goals. These goals will be based on the Federal-aid apportioned amounts and the minority population. A State will have achieved its goal if the total number of training slots on selected federally aided highway construction contracts which have been awarded during each 12-month period equals or exceeds the State's suggested minimum annual goal.

* * *

(c) The following guidelines shall be utilized by the State highway agency in selecting projects and determining the number of trainees to be provided training therein:

(1) Availability of minorities, women, and disadvantaged for training.

(2) The potential for effective training.

(3) Duration of the contract.

(4) Dollar value of the contract.

(5) Total normal work force that the average bidder could be expected to use.

(6) Geographic location.

(7) Type of work.

(8) The need for additional journeymen in the area.

(9) Recognition of the suggested minimum goal for the State.

(10) A satisfactory ratio of trainees to journeymen expected to be on the contractor's work force during normal operations (considered to fall between 1:10 and 1:4).

(d) Training programs which are established shall be approved only if they meet the standards set forth in appendix B with regard to:

(1) The primary objectives of training and upgrading minority group workers, women and disadvantaged persons.

(2) The development of full journeymen.

(3) The minimum length and type of training.

(4) The minimum wages of trainees.

(5) Trainees certifications.

(6) Keeping records and furnishing reports.

(e)(1) Training programs considered by a State highway agency to meet the standards under this directive shall be submitted to the FHWA division Administrator with a recommendation for approval.

(2) Employment pursuant to training programs approved by the FHWA division Administrator will be exempt from the minimum wage rate provisions of section 113 of title 23 U.S.C. Approval, however, shall not be given to training programs which provide for employment of trainees at wages less than those required by the Special Training Provisions. (Appendix B.)

(f)(1) Apprenticeship programs approved by the U.S. Department of Labor as of the date of proposed use by a Federal-aid highway contractor or subcontractor need not be formally approved by the State highway agency or the FHWA division Administrator. Such programs, including their minimum wage provisions, are acceptable for use, provided they are

administered in a manner reasonably calculated to meet the equal employment opportunity obligations of the contractor.

(2) Other training programs approved by the U.S. Department of Labor as of the date of proposed use by a Federal-aid highway contractor or subcontractor are also acceptable for use without the formal approval of the State highway agency or the division Administrator provided:

(i) The U.S. Department of Labor has clearly approved the program aspects relating to equal employment opportunity and the payment of trainee wage rates in lieu of prevailing wage rates.

(ii) They are reasonably calculated to qualify the average trainees for journeyman status in the classification concerned by the end of the training period.

(iii) They are administered in a manner calculated to meet the equal employment obligations of the contractors.

(g) The State highway agencies have the option of permitting Federal-aid highway construction contractors to bid on training to be given under this directive. The following procedures are to be utilized by those State highway agencies that elect to provide a bid item for training:

(1) The number of training positions shall continue to be specified in the Special Training Provisions. . . .

(2) A section concerning the method of payment should be included in the Special Training Provisions. . . .

(3) A State highway agency may modify the special provisions to specify the numbers to be trained in specific job classifications;

(4) A State highway agency can specify training standards provided any prospective bidder can use them, the training standards are made known in the advertised specifications, and such standards are found acceptable by FHWA.

§ 230.113 Implementation of supportive services.

(a) The State highway agency shall establish procedures, subject to the availability of funds under 23 U.S.C. 140(b), for the provision of supportive services in support of training programs approved under this directive. Funds made available to implement this paragraph shall not be used to finance the training of State highway agency employees or to provide services in support of such training. State highway agencies are not required to match funds allocated to them under this section.

(b) In determining the types of supportive services to be provided which will increase the effectiveness of approved training programs, State highway agencies shall give preference to the following types of services in the order listed:

(1) Services related to recruiting, counseling, transportation, physical examinations, remedial training, with special emphasis upon increasing training opportunities for members of minority groups and women;

* * *

(f) As a minimum, State highway agency contracts to obtain supportive services shall include the following provisions:

(1) A statement that a primary purpose of the supportive services is to increase the effectiveness of approved on-the-job training programs, particularly their effectiveness in providing meaningful training opportunities for minorities, women, and the disadvantaged on Federal-aid highway projects;

* * *

(3) The nondiscrimination provisions required by Title VI of the Civil Rights Act of 1964 as set forth in FHWA Form PR-1273, and a statement of nondiscrimination in employment because of race, color, religion, national origin or sex;

* * *

(5) Reporting requirements pursuant to which the State highway agency will receive monthly or quarterly reports containing sufficient statistical data and narrative content to enable evaluation of both progress and problems;

(6) A requirement that the contractor keep track of trainees receiving training on Federal-aid highway construction projects for up to 6 months during periods when their training is interrupted . . . .

(7) The basis of payment;

* * *

(g) The State highway agency is to furnish copies of the reports received under paragraph (b)(5) of this section, to the division office.

APPENDIX B OF SUBPART A OF PART 230—TRAINING SPECIAL PROVISIONS

This Training Special Provision supersedes subparagraph 7b of the Special Provision entitled "Specific Equal Employment Opportunity Responsibilities," (Attachment 1), and is in implementation of 23 U.S.C. 140(a).

As part of the contractor's equal employment opportunity affirmative action program training shall be provided as follows:

The contractor shall provide on-the-job training aimed at developing full journeymen in the type of trade or job classification involved.

The number of trainees to be trained under the special provisions will be ———— (amount to be filled in by State highway department). . . .

The contractor shall also insure that this training special provision is made applicable to such subcontract. Where feasible, 25 percent of apprentices or trainees in each occupation shall be in their first year of apprenticeship or training.

The number of trainees shall be distributed among the work classifications on the basis of the contractor's needs and the availability of journeymen in the various classifications within a reasonable area of recruitment. Prior to commencing construction, the contractor shall submit to the State highway agency for approval the number of trainees to be trained in each selected classification and training program to be used. Furthermore, the contractor shall specify the starting time for training in each of the classifications. The contractor will be credited for each trainee employed by him on the contract work who is currently enrolled or becomes enrolled in an approved program and will be reimbursed for such trainees as provided hereinafter.

Training and upgrading of minorities and women toward journeymen status is a primary objective this Training Special Provision. Accordingly, the contractor shall make every effort to enroll minority trainees and women (e.g., by conducting systematic and direct recruitment through public and private sources likely to yield minority and women trainees) to the extent that such persons are available within a reasonable area of recruitment. . . .

The minimum length and type of training for each classification will be as established in the training program selected by the contractor and approved by the State highway agency and the Federal Highway Administration. The State highway agency and the Federal Highway Administration shall approve a program if it is reasonably calculated to meet the equal employment opportunity obligations of the contractor and to qualify the average trainee for journeyman status in the classification concerned by the end of the training period. Furthermore, apprenticeship programs registered with the U.S. Department of Labor, Bureau of Apprenticeship and Training, or with a State apprenticeship agency recognized by the Bureau and training programs approved but not necessarily sponsored by the U.S. Department of Labor, Manpower Administration, Bureau of Apprenticeship and Training shall also be considered acceptable provided it is being administered in a manner consistent with the equal employment

obligations of Federal-aid highway construction contracts. Approval or acceptance of a training program shall be obtained from the State prior to commencing work on the classification covered by the program.

* * *

Except as otherwise noted below, the contractor will be reimbursed 80 cents per hour of training given an employee on this contract in accordance with an approved training program.

* * *

A contractor will have fulfilled his responsibilities under this Training Special Provision if he has provided acceptable training to the number of trainees specified. . . .

Trainees will be paid at least 60 percent of the appropriate minimum journeyman's rate specified in the contract for the first half of the training period, 75 percent for the third quarter of the training period, and 90 percent for the last quarter of the training period, unless apprentices or trainees in an approved existing program are enrolled as trainees on this project. In that case, the appropriate rates approved by the Departments of Labor or Transportation in connection with the existing program shall apply to all trainees being trained for the same classification who are covered by this Training Special Provision.

The contractor shall furnish the trainee a copy of the program he will follow in providing the training. . . .

The contractor will provide for the maintenance of records and furnish periodic reports documenting his performance under this Training Special Provision.

FITZGERALD ACT, 29 U.S.C. § 50, provides:

§ 50. Promotion of labor standards of apprenticeship

The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary

to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the Department of Health, Education, and Welfare in accordance with section 17 of Title 20. For the purposes of this chapter the term "State" shall include the District of Columbia.

REGULATIONS PURSUANT TO FITZGERALD ACT, 29 C.F.R. §§ 29, 30, provide in pertinent part:

Part 29—Labor Standards for the Registration of Apprenticeship programs

§ 29.1 Purpose and scope.

(a) The National Apprenticeship Act of 1937, section 1 (29 U.S.C. 50), authorizes and directs the Secretary of Labor "to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the Department of Health, Education, and Welfare * * *." Section 2 of the Act authorizes the Secretary of Labor to "publish information relating to existing and proposed labor standards of apprenticeship," and to "appoint national advisory committees * * *." (29 U.S.C. 50a).

(b) The purpose of this part is to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerning the registration, for certain Federal purposes, or acceptable apprenticeship programs with the U.S. Department of Labor, Employment and Training Administration,

Bureau of Apprenticeship and Training. These labor standards, policies and procedures cover the registration, cancellation and deregistration or apprenticeship programs and of apprenticeship agreements; the recognition of a State agency as the appropriate agency for registering local apprenticeship programs for certain Federal purposes; and matters relating thereto.

(c) For further information about this part 29, contact: Deputy Administrator, Bureau of Apprenticeship and Training, Employment and Training Administration, Room 5000, Patrick Henry Building, Washington, DC 20213, Telephone number (202) 376-6585.

§ 29.2 Definitions.

As used in this part:

* * *

(c) *Bureau* shall mean the Bureau of Apprenticeship and Training, Employment and Training Administration.

* * *

(f) *Apprenticeship program* shall mean a plan containing all terms and conditions for the qualification, recruitment, selection, employment and training of apprentices, including such matters as the requirement for a written apprenticeship agreement.

(g) *Sponsor* shall mean any person, association, committee, or organization operating an apprenticeship program and in whose name the program is (or is to be) registered or approved.

* * *

(l) *Registration of an apprenticeship program* shall mean the acceptance and recording of such program by the Bureau of Apprenticeship and Training, or registration and/or approval by a recognized State Apprenticeship Agency, as meeting the basic standards and requirements of the Department for approval of such program for Federal purposes.

Approval is evidenced by a Certificate of Registration or other written indicia.

(m) *Registration of an apprenticeship agreement* shall mean the acceptance and recording thereof by the Bureau or a recognized State Apprenticeship Agency as evidence of the participation of the apprentice in a particular registered apprenticeship program.

* * *

(o) *Recognized State Apprenticeship Agency* or *recognized State Apprenticeship Council* shall mean an organization approved by the Bureau as an agency or council which has been properly constituted under an acceptable law or Executive order, and has been approved by the Bureau as the appropriate body for State registration and/or approval of local apprenticeship programs and agreements for Federal purposes.

§ 29.3 Eligibility and procedure for Bureau registration of a program.

(a) Eligibility for various Federal purposes is conditioned upon a program's conformity with apprenticeship program standards published by the Secretary of Labor in this part. For a program to be determined by the Secretary of Labor as being in conformity with these published standards the program must be registered with the Bureau or registered with and/or approved by a State Apprenticeship Agency or Council recognized by the Bureau. Such determination by the Secretary is made only by such registration.

(b) No apprenticeship program or agreement shall be eligible for Bureau registration unless (1) it is in conformity with the requirements of this part and the training is in an apprenticeable occupation having the characteristics set forth in § 29.4 herein, and (2) it is in conformity with the requirements of the Department's regulation on "Equal Employment Opportunity in Apprenticeship and Training" set forth in 29 CFR part 30, as amended.

(c) Except as provided under paragraph (d) of this section, apprentices must be individually registered under a registered program. Such registration may be effected:

(1) By filing copies of each apprenticeship agreement; or

(2) Subject to prior Bureau approval, by filing a master copy of such agreement followed by a listing of the name, and other required data, of each individual when apprenticed.

* * *

(h) Under a program proposed for registration by an employer or employers' association, where the standards, collective bargaining agreement or other instrument, provides for participation by a union in any manner in the operation of the substantive matters of the apprenticeship program, and such participation is exercised, written acknowledgement of union agreement or *no objection* to the registration is required.

* * *

§ 29.5 Standards of apprenticeship.

An apprenticeship program, to be eligible for registration/approval by a registration/approval agency, shall conform to the following standards:

(a) The program is an organized, written plan embodying the terms and conditions of employment, training, and supervision of one or more apprentices in the apprenticeable occupation, as defined in this part, and subscribed to by a sponsor who has undertaken to carry out the apprenticeship training program.

(b) The program standards contain the equal opportunity pledge prescribed in 29 CFR 30.3(b) and, when applicable, an affirmative action plan in accordance with 29 CFR 30.4, a selection method authorized in 29 CFR 30.5, or similar requirements expressed in a State Plan for Equal Employment Opportunity in Apprenticeship adopted pursuant to 29 CFR part 30 and approved by the Department, and provisions concerning the following:

(1) The employment and training of the apprentice in a skilled trade;

(2) A term of apprenticeship, not less than 2,000 hours of work experience, consistent with training requirements as established by industry practice;

(3) An outline of the work processes in which the apprentice will receive supervised work experience and training on the job, and the allocation of the approximate time to be spent in each major process;

(4) Provision for organized, related and supplemental instruction in technical subjects related to the trade. A minimum of 144 hours for each year of apprenticeship is recommended. Such instruction may be given in a classroom through trade or industrial courses, or by corresponding courses of equivalent value, or other forms of self-study approved by the registration/approval agency.

(5) A progressively increasing schedule of wages to be paid the apprentice consistent with the skill acquired. The entry wage shall be not less than the minimum wage prescribed by the Fair Labor Standards Act, where applicable, unless a higher wage is required by other applicable Federal law, State law, respective regulations, or by collective bargaining agreement;

(6) Periodic review and evaluation of the apprentice's progress in job performance and related instruction; and the maintenance of appropriate progress records;

(7) The numeric ratio of apprentices to journeymen consistent with proper supervision, training, safety, and continuity of employment, and applicable provisions in collective bargaining agreements, except where such ratios are expressly prohibited by the collective bargaining agreements. The ratio language shall be specific and clear as to application in terms of jobsite, work force, department or plant;

(8) A probationary period reasonable in relation to the full apprenticeship term, with full credit given for such period toward completion of apprenticeship;

(9) Adequate and safe equipment and facilities for training and supervision, and safety training for apprentices on the job and in related instruction;

(10) The minimum qualifications required by a sponsor for persons entering the apprenticeship program, with an eligible starting age not less than 16 years;

(11) The placement of an apprentice under a written apprenticeship agreement as required by the State apprenticeship law and regulation, or the Bureau where no such State law or regulation exists. The agreement shall directly, or by reference, incorporate the standards of the program as part of the agreement;

(12) The granting of advanced standing or credit for previously acquired experience, training, or skills for all applicants equally, with commensurate wages for any progression step so granted;

(13) Transfer of employer's training obligation when the employer is unable to fulfill his obligation under the apprenticeship agreement to another employer under the same program with consent of the apprentice and apprenticeship committee or program sponsor;

(14) Assurance of qualified training personnel and adequate supervision on the job;

(15) Recognition for successful completion of apprenticeship evidenced by an appropriate certificate;

(16) Identification of the registration agency;

(17) Provision for the registration, cancellation and deregistration of the program; and requirement for the prompt submission of any modification or amendment thereto;

(18) Provision for registration of apprenticeship agreements, modifications, and amendments; notice to the registration office of persons who have successfully completed apprenticeship programs; and notice of cancellations, suspensions and terminations of apprenticeship agreements and causes therefor;

(19) Authority for the termination of an apprenticeship agreement during the probationary period by either party without stated cause;

(20) A statement that the program will be conducted, operated and administered in conformity with applicable provisions of 29 CFR part 30, as amended, or a State EEO in apprenticeship plan adopted pursuant to 29 CFR part 30 and approved by the Department;

(21) Name and address of the appropriate authority under the program to receive, process and make disposition of complaints;

(22) Recording and maintenance of all records concerning apprenticeship as may be required by the Bureau or recognized State Apprenticeship Agency and other applicable law.

* * *

§ 29.7 Deregistration of Bureau-registered program.

Deregistration of a program may be effected upon the voluntary action of the sponsor by a request for cancellation of the registration, or upon reasonable cause, by the Bureau instituting formal deregistration proceedings in accordance with the provisions of this part.

* * *

(b) *Formal deregistration*—(1) *Reasonable cause.* Deregistration proceedings may be undertaken when the apprenticeship program is not conducted, operated, and administered in accordance with the registered provisions or the requirements of this part, except that deregistration proceedings for

violation of equal opportunity requirements shall be processed in accordance with the provisions under 29 CFR part 30, as amended;

(2) Where it appears the program is not being operated in accordance with the registered standards or with requirements of this part, the registration officer shall so notify the program sponsor in writing;

* * *

§ 29.8 Reinstatement of program registration.

Any apprenticeship program deregistered pursuant to this part may be reinstated upon presentation of adequate evidence that the apprenticeship program is operating in accordance with this part. Such evidence shall be presented to the Administrator, BAT, if the sponsor had not requested a hearing, or to the Secretary, if an order of deregistration was entered pursuant to a hearing.

* * *

§ 29.10 Limitations.

Nothing in this part or in any apprenticeship agreement shall operate to invalidate:

(a) Any apprenticeship provision in any collective bargaining agreement between employers and employees establishing higher apprenticeship standards; or

(b) Any special provision for veterans, minority persons or females in the standards, apprentice qualifications or operation of the program, or in the apprenticeship agreement, which is not otherwise prohibited by law, Executive order, or authorized regulation.

* * *

§ 29.11 Complaints.

(f) A State Apprenticeship Agency may adopt a complaint review procedure differing in detail from that given in this

section provided it is proposed and has been approved in the recognition of the State Apprenticeship Agency accorded by the Bureau.

§ 29.12 Recognition of State agencies.

(a) The Secretary's recognition of a State Apprenticeship Agency or Council (SAC) gives the SAC the authority to determine whether an apprenticeship program conforms with the Secretary's published standards and the program is, therefore, eligible for those Federal purposes which require such a determination by the Secretary. Such recognition of a SAC shall be accorded by the Secretary upon submission and approval of the following:

(1) An acceptable State apprenticeship law (or Executive order), and regulations adopted pursuant thereto;

(2) Acceptable composition of the State Apprenticeship Council (SAC);

(3) An acceptable State Plan for Equal Employment Opportunity in Apprenticeship;

(4) A description of the basic standards, criteria, and requirements for program registration and/or approval; and

(5) A description of policies and operating procedures which depart from or impose requirements in addition to those prescribed in this part.

(b) *Basic requirements.* Generally the basic requirements under the matters covered in paragraph (a) of this section shall be in conformity with applicable requirements as set forth in this part. Acceptable State provisions shall:

(1) Establish the apprenticeship agency in: (i) The State Department of Labor, or (ii) in that agency of State government having jurisdiction of laws and regulations governing wages, hours, and working conditions, or (iii) that State agency presently recognized by the Bureau, with a State official empowered to direct the apprenticeship operation;

* * *

(6) Prescribe the contents of apprenticeship agreements;

(7) Limit the registration of apprenticeship programs to those providing training in *apprenticeable* occupations as defined in § 29.4;

* * *

(9) Provide for the cancellation, deregistration and/or termination of approval of programs, and for temporary suspension, cancellation, deregistration and/or termination of approval of apprenticeship agreements; . . .

* * *

(e) *State apprenticeship programs.* (1) An apprenticeship program submitted for registration with a State Apprenticeship Agency recognized by the Bureau shall, for Federal purposes, be in conformity with the State apprenticeship law, regulations, and with the State Plan for Equal Employment Opportunity in Apprenticeship as submitted to and approved by the Bureau pursuant to 29 CFR 30.15, as amended;

(2) In the event that a State Apprenticeship Agency is not recognized by the Bureau for Federal purposes, or that such recognition has been withdrawn, or if no State Apprenticeship Agency exists, registration with the Bureau may be requested. Such registration shall be granted if the program is conducted, administered and operated in accordance with the requirements of this part and the equal opportunity regulation in 29 CFR part 30, as amended.

Part 30—Equal Employment Opportunity in Apprenticeship and Training

§ 30.1 Scope and purpose.

This part sets forth policies and procedures to promote equality of opportunity in apprenticeship programs registered with the U.S. Department of Labor and in state apprenticeship programs registered with recognized state apprenticeship

agencies. These policies and procedures apply to the recruitment and selection of apprentices, and to all conditions of employment and training during apprenticeship. The procedures established provide for review of apprenticeship programs, for registering apprenticeship programs, for processing complaints, and for deregistering noncomplying apprenticeship programs. This part also provides policies and procedures for continuation or withdrawal of recognition of state agencies for registering of apprenticeship programs for Federal purposes. The purpose of this part is to promote equality of opportunity in apprenticeship by prohibiting discrimination based on race, color, religion, national origin, or sex in apprenticeship programs, by requiring affirmative action to provide equal opportunity in such apprenticeship programs, and by coordinating this part with other equal opportunity programs.

* * *

§ 30.3 Equal opportunity standards.

(a) *Obligations of sponsors.* Each sponsor of an apprenticeship program shall:

(1) Recruit, select, employ, and train apprentices during their apprenticeship, without discrimination because of race, color, religion, national origin, or sex; and

(2) Uniformly apply rules and regulations concerning apprentices, . . .

(3) Take affirmative action to provide equal opportunity in apprenticeship, including adoption of an affirmative action plan as required by this part.

(b) *Equal opportunity pledge.* Each sponsor of an apprenticeship program shall include in its standards the following equal opportunity pledge:

The recruitment, selection, employment, and training of apprentices during their apprenticeship, shall be without discrimination because of race, color, religion, national origin, or

sex. The sponsor will take affirmative action to provide equal opportunity in apprenticeship and will operate the apprenticeship program as required under title 29 of the Code of Federal Regulations, part 30.

* * *

§ 30.4 Affirmative action plans.

(a) *Adoption of affirmative action plans.* A sponsor's commitment to equal opportunity in recruitment, selection, employment, and training of apprentices shall include the adoption of a written affirmative action plan.

* * *

(d) *Goals and timetables.* (1) A sponsor adopting a selection method under § 30.5(b) (1) or (2) which determines on the basis of the analysis described in paragraph (e) of this section that it has deficiencies in terms of underutilization of minorities and/or women (minority and nonminority) in the craft or crafts represented by the program shall include in its affirmative action plan percentage goals and timetables for the admission of minority and/or female (minority and nonminority) applicants into the eligibility pool.

* * *

§ 30.5 Selection of apprentices.

(a) *Obligations of sponsors.* In addition to the development of a written affirmative action plan to ensure that minorities and women have an equal opportunity for selection as apprentices and otherwise ensure the prompt achievement of full and equal opportunity in apprenticeship, each sponsor shall further provide in its affirmative action program that the selection of apprentices shall be made under one of the methods specified in the following subparagraphs (1) through (4) of paragraph (b) of this section.

(b) *Selection methods.* The sponsor shall adopt one of the following methods for selecting apprentices:

* * *

(iii) *Creation of pool of eligibles.* A pool of eligibles shall be created from applicants who meet the qualifications of minimum legal working age; or from applicants who meet qualification standards in addition to minimum legal working age: *Provided,* That any additional qualification standards conform with the following requirements:

(A) *Qualification standards.* The qualification standards, and the procedures for determining such qualification standards, shall be stated in detail and shall provide criteria for the specific factors and attributes to be considered in evaluating applicants for admission to the pool.

* * *

(vii) *Compliance.* A sponsor shall be deemed to be in compliance with its commitments under paragraph (b)(1)(vi) of this section if it meets its goals or timetables or if it makes a good faith effort to meet these goals and timetables. In the event of the failure of the sponsor to meet its goals and timetables, it shall be given an opportunity to demonstrate that it has made every *good faith effort* to meet its commitments (see § 30.4(f)). All the actions of the sponsor shall be reviewed and evaluated in determining whether such good faith efforts have been made.

* * *

§ 30.13 Sanctions.

(a) Where the Department, as a result of compliance review or other reason, determines that there is reasonable cause to believe that an apprenticeship program is not operating in accordance with this part and voluntary corrective action has not been taken by the program sponsor, the Department shall institute proceedings to deregister the program or it shall refer the matter to the Equal Employment Opportunity Commission or to the Attorney General with recommendations for the institution of a court action under title VII of the Civil Rights

Act of 1964, as amended, or to the Attorney General for other court action as authorized by law.

(b) Deregistration proceedings shall be conducted in accordance with the following procedures:

* * *

§ 30.14 Reinstatement of program registration.

Any apprenticeship program deregistered pursuant to this part may be reinstated upon presentation of adequate evidence to the Secretary that the apprenticeship program is operating in accordance with this part.

§ 30.15 State Apprenticeship Councils.

(a) *Adoption of consistent state plans.* (1) The Department shall encourage State Apprenticeship Councils to adopt and implement the requirements of this part.

* * *

EXECUTIVE ORDER 11,246, 30 Fed. Reg. 12,319 (1965) provides in pertinent part:

Executive Order 11246

EQUAL EMPLOYMENT OPPORTUNITY

September 24, 1965

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

PART I—NONDISCRIMINATION IN GOVERNMENT EMPLOYMENT

SECTION 101. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal

opportunity applies to every aspect of Federal employment policy and practice.

* * *

PART II—NONDISCRIMINATION IN EMPLOYMENT BY GOVERNMENT CONTRACTORS AND SUBCONTRACTORS

SUBPART A—DUTIES OF THE SECRETARY OF LABOR

SEC. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

SUBPART B—CONTRACTORS' AGREEMENTS

SEC. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

'During the performance of this contract, the contractor agrees as follows:

'(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

* * *

SUBPART C—POWERS AND DUTIES OF THE SECRETARY OF LABOR AND THE CONTRACTING AGENCIES

SEC. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors.

* * *

SEC. 207. The Secretary of Labor shall use his best efforts, directly and through contracting agencies, other interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order.

* * *

SUBPART D—SANCTIONS AND PENALTIES

SEC. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

* * *

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under Subsection (a)(2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a)(5) of this Section for failure of a contractor or subcontractor to comply with the contract provisions of this Order.

* * *

PART III—NONDISCRIMINATION PROVISIONS IN FEDERALLY ASSISTED CONSTRUCTION CONTRACTS

SEC. 301. Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 202 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the administering department or agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations, and relevant orders of the Secretary, (2) to obtain and to

furnish to the administering department or agency and to the Secretary of Labor such information as they may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor or the administering department or agency pursuant to Part II, Subpart D, of this Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.

SEC. 302. (a) 'Construction contract' as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) The provisions of Part II of this Order shall apply to such construction contracts, and for purposes of such application the administering department or agency shall be considered the contracting agency referred to therein.

* * *

SEC. 303. (a) Each administering department and agency shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor, and to furnish the Secretary such information and assistance as he may require in the performance of his functions under this Order.

* * *

N.Y. LABOR LAW § 198-c provides in pertinent part:

§ 198-c. Benefits or wage supplements

1. In addition to any other penalty or punishment otherwise prescribed by law, any employer who is party to an agreement to pay or provide benefits or wage supplements to employees or to a third party or fund for the benefit of employees and

who fails, neglects or refuses to pay the amount or amounts necessary to provide such benefits or furnish such supplements within thirty days after such payments are required to be made, shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in section one hundred ninety-eight-a of this article. Where such employer is a corporation, the president, secretary, treasurer or officers exercising corresponding functions shall each be guilty of a misdemeanor.

N.Y. LABOR LAW § 227 provides in pertinent part:

§ 227. Enforcement of the provisions of this article

The procedure for ascertaining and determining the hours of labor and the prevailing rate of wage shall be as prescribed by section two hundred and twenty of this chapter, except that the "fiscal officer," referred to therein shall in every instance, for the purposes of this article be the state industrial commissioner.[1]

* * *

When an order of the industrial commissioner has been made, any person or corporation that wilfully refuses thereafter to pay the prevailing rate of wages determined by said order . . . shall be guilty of a misdemeanor and upon conviction shall be punished, for a first offense by a fine of five hundred dollars or by imprisonment for not more than thirty days, or by both such fine and imprisonment; for a second offense by a fine of one thousand dollars or by imprisonment for not more than ninety days or by both such fine and imprisonment, and after conviction of a second offense no such person or corporation shall be entitled to receive any sum of money . . . for or on account of work done upon any such contract.

---

[1] Now commissioner of labor.

REGULATIONS PURSUANT TO SECTION 220 OF NEW YORK LABOR LAW, N.Y. Codes R. & Regs., tit. 12., § 220.1-.3, provide:

Section 220.1 Definition of supplements. Supplements, as defined in subdivision 5(b) of section 220 of the Labor Law, may include, but are not necessarily limited to, medical, dental or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or training or other similar programs, but only where the contractor or subcontractor is not required by other Federal, State or local law to provide such benefits.

220.2. Contribution and computation of supplements. (a) For purposes of subdivision 3 of section 220 of the Labor Law, supplements shall include the amount of:

(1) any contribution irrevocably made by a contractor or subcontractor on behalf of laborers, workers and mechanics to a fund, plan or program to provide supplements; and

(2) the cost to the contractor or subcontractor which is actually incurred in providing supplements not covered by paragraph (1) of this subdivision to laborers, workers and mechanics, provided such supplements are enumerated in the current annually determined prevailing wage rate schedule promulgated by the Commissioner of Labor for the applicable trade or occupation in the locality.

(b) Any portion or all of the supplement obligations of a contractor or subcontractor may be satisfied by paying to the laborers, workers and mechanics affected in cash with the regular weekly wages, the cost of such supplement(s) as contained in the current annually determined prevailing wage rate schedule.

(c) (1) An employer must furnish to the Commissioner of Labor, upon request, within 10 days, proof of any supplements provided or amounts paid to or on behalf of its

employees in satisfaction of its obligation to provide prevailing supplements.

(2) If an employer provides any supplement which is part of a fund, plan or program as set forth in paragraph (1) of subdivision (a) of this section, it must furnish to the Commissioner of Labor, upon request, within 10 days, proof that the supplement is provided through a fund, plan or program and the amount contributed on the employees' behalf to such fund, plan or program.

(3) The failure of an employer to provide the Commissioner of Labor with proof of any prevailing supplements paid or provided to or on behalf of its employees shall result in an investigatory finding that supplements were not paid or provided in violation of the second unnumbered paragraph of subdivision 3 of section 220 of the Labor Law.

(d) To determine the hourly cash equivalent of any applicable supplement provided to or on behalf of laborers, workers and mechanics employed upon public work projects in accordance with subdivision (a) of this section, the Commissioner of Labor will:

(1) divide the actual contribution or cost for providing such supplement by the total annual hours worked on both public and private work, where such proof is provided to the Commissioner of Labor by the employer;

(2) divide the actual annual contribution or cost for providing such supplement by 2080 hours (8 hours per day × 5 days per week × 52 weeks), where proof of the total annual hours worked by the employee on both public and private work is not provided to the Commissioner of Labor by the employer;

(3) divide the actual annual contribution or cost for providing such supplement by 1820 hours (7 hours per day × 5 days per week × 52 weeks), where proof of the total annual hours worked by the employee on both public and private work is not provided to the Commissioner of Labor by

the employer but proof is provided establishing that the employee worked only 7 hours per day (excluding meal periods).

220.3 Effective dates of annual determinations. Updated schedules of prevailing rates of wages and supplements as annually promulgated by the commissioner of labor pursuant to paragraphs (a) and (c) of subdivision 5 of section 220 of the Labor Law, shall become effective on July first of each year, regardless of the date on which such prevailing wage rate schedule is received by the department of jurisdiction, the contractor or any subcontractor. The contractor and/or any subcontractor shall be responsible for paying all laborers, workers and mechanics employed upon new or ongoing public work projects the current prevailing rates of wages and supplements, as reflected in such updated schedules, effective July first of each year.

(2)

No. 94-1919

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TAP ELECTRICAL CONTRACTING SERVICE, INC.,
Petitioner,

v.

JOHN E. SWEENEY,
as Commissioner of Labor of the State of New York,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

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BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

1. Whether petitioner preserved for review by this Court its claim that the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA") preempts the New York State Labor Law's requirement that only employees who are registered with the state as apprentices can be paid less than journey-level wages on public work projects, where petitioner failed to raise the issue until this case was before the New York State Court of Appeals and where the Court of Appeals refused to reach the issue?

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On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent John E. Sweeney,[1] Commissioner of the New York State Department of Labor ("Commissioner") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by TAP Electrical Contracting Service, Inc. ("TAP"). The petition should be denied because TAP did not preserve the ERISA preemption issue which it seeks to have this Court review and the decision of the New York Court of Appeals does not conflict with the decisions of other courts.

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[1] John E. Sweeney has replaced Thomas F. Hartnett as Commissioner of Labor of the State of New York.

STATEMENT OF THE CASE

1. Statutory Framework

Article 1, § 17 of the New York Constitution provides that workers on public projects shall not be "paid less than the rate of wages prevailing in the same trade or occupation in the locality . . . where such public work is to be situated." Article 8 of the Labor Law, New York Labor Law § 220 *et seq.* (the "prevailing wage law"), carries out this constitutional mandate.

Labor Law § 220(5) requires the fiscal officer, the Commissioner in this case, to determine the prevailing rate of wages and "supplements" to be paid on a public work project. Supplements, or fringe benefits, are defined as any payments which are not "wages", including benefits and vacation and holiday pay. Labor Law § 220 (5)(b).

The law requires that all workers on a public work project be paid the prevailing journey-level wage rates. However, those who are individually registered with the New York State Department of Labor in an apprenticeship training program which is also registered with the State, may be paid an apprentice wage rate. Labor Law § 220(3-e); *Matter of Monarch Electrical v. Roberts,* 70 N.Y.2d 91, 517 N.Y.S.2d 711 (1987).

If the Commissioner finds that a contractor has violated the prevailing wage law, he is empowered to order payment of any wages or supplements due, including interest, and a civil penalty not to exceed twenty-five percent of the total amount due. N.Y. Labor Law § 220(8). Where a violation is found, the Commissioner must make a determination whether the violation was "willful". N.Y. Labor Law § 220(7-a). When there are two final determinations that a contractor has willfully underpaid prevailing wages and supplements within any consecutive six-year period, the contractor is ineligible to bid on any public work project for a period of five years. N.Y. Labor Law § 220-b(3)(b).

2. Factual and Procedural Background

This case originated in TAP's appeal of an October 31, 1989 order and determination of the Commissioner. (Order attached to Petition at A28-A38). That order, which followed an administrative hearing, found that, on a public work project on the Northern State Parkway in 1985, TAP had violated Labor Law § 220, the prevailing wage law, by (1) underpaying prevailing supplements, required under Labor Law § 220; (2) paying less than a journey-level wage and supplement rate to trainee workers on the project who were not registered in a state-registered apprenticeship program, and (3) exceeding the allowable ratio of apprentice workers to journey-level workers on the project. Since that was TAP's second willful violation of the prevailing wage law within a six year period, TAP was debarred from bidding on any public work projects for a period of five years, until November 1994.

TAP appealed the Commissioner's October 31, 1989 order to the New York State Supreme Court, Appellate Division, Second Department,[2] arguing that in light of the recent decision in *General Electric Company v. N.Y. State Department of Labor*, 891 F.2d 25 (2d Cir. 1989), the Commissioner was preempted by the Employee Retirement Income Security Act, 29 U.S.C. 1001 *et seq.* ("ERISA") from enforcing the supplement provisions of the prevailing wage law ("the supplement claim").[3] TAP

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[2] Labor Law § 220(8) provides that orders in prevailing wage cases be appealed directly to the Appellate Division of the New York State Supreme Court.

[3] At the administrative hearing, the Union Local 363 Fringe Benefit Funds, which was represented as an interested party at the hearing, submitted a third party motion to dismiss "so much of the within complaint . . . which alleges underpayments by TAP to union-affiliated fringe benefit funds on the basis that they were allegedly not made at the 'prevailing levels' " on the ground that they were preempted by ERISA. (Respondent's exhibit C at administrative hearing). TAP joined in the motion. The Hearing

also argued that the Commissioner's failure to allow the payment of less than journey-level wages to "trainees" who were not in a state-registered apprenticeship program was preempted by the Federal-Aid Highway Act, 23 U.S.C. § 101 *et seq.* ("FAHA") ("the trainee claim"), and that the excessive use of apprentices could not form the basis for TAP's debarment since, pursuant to Labor Law § 220-b(3)(b), debarment may only be based on the willful failure to pay prevailing wages and supplements and not on other violations of the prevailing wage law ("the apprentice ratio claim").

In a decision reported as *Matter of TAP Electrical Contracting Corp. v. Hartnett*, 156 A.D.2d 612, 549 N.Y.S.2d 118 (2d Dept. 1989) (Petition, p. A22-A25), the Second Department held that ERISA preempted the Commissioner from enforcing the supplement provisions of Labor Law § 220 as to those fringe benefits for which TAP maintained ERISA-covered employee benefit plans. However, the court held that the Commissioner could continue to enforce the supplement provisions as to the three benefits for which TAP did not have ERISA employee benefit plans. The court remitted the case to the Commissioner "to compute the exact amount of non-ERISA supplement underpayments." 156 A.D.2d at 614; A25. The court also annulled the Commissioner's determination that TAP could not pay trainees who were not registered with the State as apprentices less than journey-level wages. 156 A.D.2d at 615; A25. Finally, the Second Department noted that the Commissioner's finding that TAP had violated the applicable apprentice ratio had not formed a basis for TAP's debarment. 156 A.D. 2d at 615; A25.

Both parties sought leave to appeal the decision to the New York State Court of Appeals. TAP sought leave to

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Officer denied the motion on the ground that the Commissioner's requirement that TAP pay prevailing supplements did not "relate to" employee benefit plans. (Hearing Officer's Report and Recommendation, pp. 19-24.)

appeal on the supplement claim and the Commissioner sought leave on the trainee claim.[4] Neither party sought further review of the Appellate Division's determination regarding the apprenticeship ratio claim. The Court of Appeals granted both parties leave to appeal.

In its brief to the Court of Appeals, TAP argued for the first time that ERISA preempted the Commissioner from requiring TAP to pay journey-level wages to trainees who were not state registered apprentices (*See* TAP's Reply Brief and Brief in Opposition to Respondent's Appeal, pp. 53-57.) Since all of TAP's prior arguments with respect to the trainee claim concerned whether the Commissioner's actions were preempted by the Federal Aid Highway Act, the Commissioner argued that TAP's ERISA preemption argument had not been preserved for review by the Court of Appeals (*See*, Respondent-cross-appellant's Reply brief, p. 11.) The Court of Appeals agreed. In its decision, reported at 76 N.Y. 2d 164, 556 N.Y.S.2d 998 (Petition, A15-A19) the Court held that the "only argument preserved for our review" was whether the Commissioner was preempted by the Federal-Aid Highway Act from requiring that trainees who were not state-registered apprentices be paid journey-level wages. 76 N.Y.2d at 168; A16. Accordingly, the Court did not address the issue, belatedly raised by TAP, of whether the Commissioner was preempted by ERISA on the trainee claim.[5]

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[4] Both parties also sought to appeal as of right pursuant to New York Civil Practice Law and Rules § 5601(b) to the Court of Appeals on the ground that the issues presented substantial constitutional issues. The Court dismissed the appeals as of right on the ground that the order appealed from did not finally determine the proceeding.

[5] Nor did the Court decide the supplement claims raised by TAP which the Commissioner had also argued were not preserved for review. TAP had raised additional arguments concerning preemption under ERISA of the supplement provisions that had not been raised in either the administrative proceeding or in the Appellate Division (Brief for respondent-cross-appellant, pp. 17-18.)

With regard to the issue that had been preserved, the Court held that there was no preemption under the Federal Aid Highway Act and that substantial evidence supported the Commissioner's finding that TAP's violation of state law on the trainee claim had been willful. Accordingly, the Court reversed the Second Department's decision on this issue and expressly reinstated the Commissioner's order requiring TAP to pay the trainee workers journey-level wages. 76 N.Y.2d at 171; A19.

Following the decision by the Court of Appeals, the case was remanded to the Commisisoner of Labor, in accordance with the Appellate Division's decision, for a computation of the amount of non-ERISA supplement underpayments. Both Counsel for the Department of Labor and TAP's attorneys submitted information to the Commissioner concerning how the supplements should be calculated. On February 6, 1991, the Commissioner issued an Order and Determination on remand from the Appellate Division. (Petition, A10-A14). The Commissioner found that TAP owed $5,093.59 in non-ERISA supplement underpayments.

TAP appealed the Commissioner's February 6, 1991 order to the Appellate Division, Second Department. Although the Second Department's remand, and the Commissioner's order on remand, concerned only the issue of supplement underpayments, TAP raised several issues before the Apellate Division concerning trainee wages and apprentice ratios that either were raised or could have been raised during the appeal of the Commissioner's October 31, 1989 order. Among them was the claim that ERISA preempted the Commissioner from requiring TAP to pay journey-level wages to trainees who were not state-registered apprentices.

In its Order and Judgment dated August 29, 1994 reported as *Matter of TAP Electrical Contracting Service, Inc. v. Hartnett*, 207 A.D.2d 547, 616 N.Y.S.2d 86 (2d Dept. 1994) (Petition A2-A7), the Second Department

rejected the Commissioner's method for computing non-ERISA supplement underpayments and held that there were no such underpayments. 207 A.D.2d at 550; A6. However, it confirmed the Commissioner's order insofar as it found that TAP had willfully violated Labor Law § 220. The court noted that one basis for TAP's debarment had been the trainee claim and that although the court had annulled this determination in its previous order, "the Court of Appeals reinstated this portion of the Commissioner's determination." 207 A.D.2d at 550; A7. Accordingly, the court concluded that TAP's attempt to relitigate the trainee issue was barred by the doctrine of *res judicata*. 207 A.D.2d at 550-51; A7.

TAP filed a notice of appeal of the Appellate Division's decision to the New York Court of Appeals on December 22, 1994 seeking to raise issues concerning the trainee and apprenticeship claims. On February 21, 1995, the Court of Appeals dismissed the appeal on the ground that it did not present a substantial constitutional issue. (Petition, A1).

SUMMARY OF ARGUMENT

The petition should be denied because TAP seeks review of an issue that was not properly preserved in the state court proceeding and, therefore, never ruled upon by the New York Court of Appeals. The issue of whether the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* (*"ERISA"*) preempted the New York State Labor Law's requirement that only employees who are registered with the state as apprentices can be paid less than journey-level wages on public work projects, was not raised by TAP until it appealed to the New York Court of Appeals. The Court of Appeals did not reach, much less decide, that issue. Instead, it expressly limited its decision to the issue of whether the state requirement was preempted by the Federal-Aid Highway Act, 23 U.S.C. 101 *et seq.* ("FAHA"). *Matter of TAP Electrical*

Contracting Service Inc. v. Hartnett, 76 N.Y.2d 164, 556 N.Y.S.2d 998 (1990) (Petition, A15-A19). Since the ERISA preemption issue was "not pressed or passed upon below," this Court should decline to hear TAP's claim. *Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. 71, 79 (1988). Moreover, since the New York Court of Appeals never reached the issue, there is no basis for TAP's assertion that the decision creates a conflict with other courts.

REASONS FOR DENYING THE WRIT

TAP'S CLAIM THAT ERISA PREEMPTS THE NEW YORK STATE LABOR LAW'S REQUIREMENT THAT ONLY STATE REGISTERED EMPLOYEES CAN BE PAID LESS THAN JOURNEY-LEVEL WAGES WAS NOT PRESERVED FOR REVIEW BY THIS COURT

TAP's petition for certiorari is based on its claim that ERISA preempts the New York State Labor Law's requirement that only state-registered employees can be paid less than journey-level wages on public work projects. TAP fails to mention, however, that this issue was not properly raised in the state court proceeding and, therefore, was never addressed by the state courts. Accordingly, this claim was not preserved for review and should not be considered by this Court.

It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-97 (1981). *See also Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549-550 (1987). Claims that were "not pressed or passed upon below" will not be heard by the Court. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). Moreover, when "the highest state court has failed to pass upon a

federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). *See also Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). In this case, TAP cannot satisfy this fundamental requirement for review by this Court.

TAP did not raise the issue of ERISA preemption with respect to the trainee claim until this case was before the New York Court of Appeals. At the first administrative hearing before the Department of Labor, TAP joined in an ERISA preemption challenge which concerned only the supplement claim. No ERISA preemption challenge was made at that time as to the trainee or apprenticeship claims.[6] Similarly, during the appeal of the Commissioner's October 1989 order in the Appellate Division, Second Department, TAP again raised ERISA preemption only as to the supplement claim and, with respect to the trainee claim, raised only the issue of FAHA preemption and preemption under the Davis-Bacon Act, 40 U.S.C. § 276a.

The first reference to ERISA preemption in the context of the trainee claim was made by TAP in reply to the Commissioner's appeal of the Appellate Division's deci-

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[6] TAP erroneously states that "[a]t the outset of the hearings, TAP moved to dismiss the complaint on grounds of ERISA preemption" (Petition, p. 12 n.14), implying that TAP moved to dismiss the entire complaint based on ERISA preemption. However, the motion made by Union Local 363 Fringe Benefit Funds, that was supported by TAP, sought to dismiss only "so much of the within complaint . . . which alleges underpayments by TAP to union-affiliated fringe benefit funds on the basis that they were allegedly not made at the 'prevailing levels' " (Respondent's exhibit C at administrative hearing). Therefore, the motion only concerned the supplement claim. The Hearing Officer's Report and Recommendation denying the claim discusses only ERISA preemption of the supplement claim. (Hearing Officer's Report and Recommendation, pp. 19, 24).

sion in the Court of Appeals (*see* TAP's Reply Brief and Brief in Opposition to Respondent's Appeal, pp. 53-57).[7] The Commissioner argued, in response, that TAP's ERISA preemption argument was not preserved for review. (*See*, Respondent-cross-Appellant's Brief, p. 11). The Court of Appeals agreed and went on to determine only the merits of the FAHA preemption claim, calling that issue the "only argument preserved for our review" 76 N.Y.2d at 168.[8] Since New York State law does not consider issues raised for the first time before the Court of Appeals to be preserved for review, *Cibro Petroleum Products v. Chu*, 67 N.Y.2d 806, 809, 501 N.Y.S. 321 (1986), TAP cannot meet its burden of demonstrating that the ERISA claim was adequately presented in state court.[9]

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[7] In presenting the issues to the Court, TAP argued only that Labor Law § 220 regulated the substantive terms of TAP's training program (TAP's Reply Brief, pp. 53-57). TAP never raised many of the arguments it makes in its petition, i.e., that Labor Law § 220 "refers to" ERISA plans or that the law imposes alternative enforcement mechanisms.

[8] The Court of Appeals stated that "the only argument preserved for our review in these cross-appeals is whether the holding in *Matter of Monarch Elect. Constr. Corp. v. Roberts* (70 NY 2d 91) applies to construction projects jointly funded by the State and Federal governments under the Federal Aid Highway Act" (Petition, p. A-16). In *Monarch*, the Court of Appeals held that under the New York State prevailing wage law federal trainees who were not registered as apprentices with the state could not be paid less than journey-level wages. Thus the issue decided by the Court of Appeals was whether the fact that this project was partially funded under the FAHA prohibited the state from enforcing that section of the prevailing wage law, i.e. whether the state law was preempted by the FAHA.

[9] TAP subsequently attempted to raise the issue of ERISA preemption of the trainee claim in the Appellate Division, Second Department during the remand on the supplement issue and the appeal of the Commissioner's February 1991 order even though the remand did not concern the trainee issue. The Appellate Division held that res judicata barred TAP from relitigating the trainee issue. (Petition, A7).

While TAP acknowledges that the Court of Appeals "did not directly address" the issue of ERISA preemption (Petition, p. 15), it nevertheless seeks to imply that the issue was reached and decided by citing the court's conclusion that "section 220 is not in conflict with or preempted by Federal law" (Petition, p. 15, 76 N.Y.2d at 170, Petition, A19). This reading of the Court's of Appeal's decision is erroneous. The court's decision discusses only preemption under the FAHA and the Davis-Bacon Act and *then* concludes that "[a]ccordingly" the prevailing wage law is not in conflict with Federal law. 76 N.Y.2d at 170. Thus, the Court plainly did not reach, much less decide, the issue of ERISA preemption. Indeed, given the fact that: (a) the Commissioner argued that TAP had failed to preserve the ERISA claim; (b) the Court of Appeals stated that the only argument preserved for review was whether the *Monarch* case applied to this case, and (c) the Court of Appeals did not reach the ERISA issue, it is evident that the Court of Appeals decided that the ERISA issue had not been preserved for review.

Moreover, on this record, there is no basis for TAP's argument that the decision of the Court of Appeals is in "direct conflict" with the decisions of several Federal Courts of Appeals which have held that ERISA preempts various state apprentice program requirements. Since the Court of Appeals did not address the ERISA preemption issue, its decision cannot present a conflict with the cases upon which TAP relies. Accordingly, this Court should deny the petition for certiorari.[10]

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[10] While not addressing the issue in the "Reasons for granting certiorari" section of its petition, TAP states in its "Statement of the Case" that ERISA preemption is also mandated because the supplement provisions of the prevailing wage law impermissibly regulate ERISA plans. (Petition, p. 8) TAP was successful in the Appellate Division Second Department in overturning the Commissioner's actions against TAP on the supplement claim. (Petition, A2-A7). There is, therefore, no existing case or controversy concerning the supplement issue for this Court to consider.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

TAP ELECTRICAL CONTRACTING SERVICE, INC.,

Petitioner,

vs.

JOHN E. SWEENEY, as Commissioner of Labor of the State of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY BRIEF

Petitioner TAP Electrical Contracting Service, Inc. ("TAP"), in response to the opposition papers of Respondent, Commissioner of Labor of the State of New York ("Commissioner"),[1] observes that Respondent, like the New York Court of Appeals, seeks to maintain the status quo and not have this Court determine whether ERISA[2] preempts the State's Prevailing Wage Law apprenticeship provisions. Respondent's opposition rests solely on the faulty assertion that TAP has not properly "preserved" the important issues presented for this Court's review. However, from the outset of these proceedings, TAP has asserted that ERISA preempts the Commissioner's Orders against TAP in their entirety (C- *passim*[3]).

In seeking to perpetuate the State's favoring of the State-registered IBEW apprenticeship program (which was held to discriminate against minorities and women)[4] over TAP's federally-approved ERISA training plan solely on (erroneous) technical grounds, Respondent misses the essential points: (1) that the Commissioner has applied N.Y. Labor Law Section 220 ("Section 220") with the penal sanction of "debarment" in this case -- and throughout the State by virtue of the *Monarch*[5] decision, whose scope was broadened herein -- to forbid all public works contractors (on projects receiving any

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[1] John E. Sweeney replaced John F. Hartnett as Commissioner of Labor of the State of New York ("Commissioner"), as noted in the caption

[2] Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA").

[3] Pursuant to Supreme Court Rules 21.1(h), Petitioner has attached as Appendix C hereto pertinent excerpts from its State Court Petition and Briefs at each stage of these proceedings, to demonstrate its preservation of the issues sought to be reviewed herein. References to these materials are denoted by (C-[page]).

[4] E.*E.O.C. v. Joint Apprenticeship Board of the Elec. Indust.*, 828 F.Supp. 264 (S.D.N.Y. 1993) ("EEOC v. JAC").The discriminatory apprenticeship program sponsored and administered by Local 3 of the International Brotherhood of Electrical Workers ("IBEW") is currently the sole "State-registered" union apprenticeship program in the electrical industry in the New York metropolitan area.

[5] *Matter of Monarch Elec. Contracting Corp. v. Roberts*, 70 N.Y.2d 91, 517 N.Y.S.2d 711 (1987)("*Monarch*").

amount of state funding) from employing "trainees" in any Federally-approved training program; and (2) that the challenged Sections of 220 impose artificial and illegal barriers to the entry of women and minorities to the electrical construction trades. By favoring State-registered apprentice programs and apprentices, and imposing sanctions on all others, the Commissioner's application of Section 220 impermissibly "affects" and "regulates" the terms of employee training programs that are ERISA plans. Such regulation is in derogation of the exclusive Federal jurisdiction to regulate ERISA training programs. 29 U.S.C. §§ 1002(1), 1144(a) and (c). Petitioner seeks review under the Supremacy Clause of the United States Constitution to halt the State's continued impermissible action which injures Federal equal employment policy, intrudes upon contractors' Federal rights, and is directly contrary to the decisions of Federal courts invalidating similar laws in California, Oklahoma, Nevada, Minnesota, and Michigan.[6]

As demonstrated in TAP's Petition, the only material difference between the Federal "training" programs "forbidden" in New York, and the State-approved "apprenticeship" programs, are the entry-level barriers contained in the IBEW program favored by the State: more onerous "education" and "experience" requirements that comprise discriminatory "barriers" to entry by minorities and women into skilled construction trades, here the electrician trades. *See Monarch*, 70 N.Y.2d at 97, 517 N.Y.S.2d at 714; *E.E.O.C. v. JAC*. To comply with Section 220, a contractor must not only abandon its participation in a Federally-approved training program on any project which is partially State-funded, but must also abandon all *individual employee-participants* enrolled in the Federal training program who are unable to meet the State-registered program's more onerous entry-level citeria for individual registration.

Respondent persists in applying these concededly "anomalous" -- and, in fact, unconstitutional -- provisions of Section 220, despite having been admonished eight years ago by the Court of Appeals in *Monarch* that the State must act to remedy

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[6] See cases cited in TAP's May 22, 1992 Petition for a Writ of Certiorari ("Petition") at p.7, n.7, and pp. 20-29.

the (then) "unforseen" effect of Section 220's apprentice provisions that "frustrate" the "compelling" Federal policy "of reducing discrimination in the construction labor force." 70 N.Y.2d at 99, 517 N.Y.S.2d at 715. Notably, the Federal programs that are "frustrate[d]" in New York are the very forms of non-quota and non-preference-based "affirmative action" initiatives -- training and outreach -- which remain approved by this Court under *Adarand Constructors, Inc. v. Pena*, 118 S.Ct. 2097 (1995).[7]

Respondent's own "Statement of the Case," standing alone, shows facts sufficient to require preemption by ERISA of Section 220 on its face and as applied herein:

> "The law [§ 220] requires that all workers on a public work project be paid the prevailing journey-level wage rates. However, those who are individually registered with the New York State Department of Labor in an apprenticeship training program which is also registered with the State, may be paid an apprentice wage rate. Labor Law § 220(3-e)." (Resp. Br. at 2)

In *Dillingham Constr. N.A. v. Sonoma County*, 57 F.3d 712 (9th Cir. 1995) (***motion for reh'g filed***), the U.S. Court of Appeals for the Ninth Circuit held that a functionally identical provision in California's law impermissibly favored State-registered ERISA plans by conferring upon them beneficial terms that relate to and directly regulate the benefits provided, and thus impermissibly enforced or encouraged selection of State-approved ERISA plans and participants, while burdening others.[8] There, The Ninth Circuit described the statutory scheme in terms virtually identical to those at issue here:

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[7] One reason for granting review herein is to clarify after *Adarand* the kinds of "affirmative action" efforts that clearly pass Constitutional muster. Here, the Federal training programs afford entry-level opportunities for women and minorities historically excluded from skilled trades, but do so without "set-asides," "quotas" or "racial classifications." See 23 C.F.R. §230.107-.113 and Part 230, Subpart A, Appendix B (B-12-19).

[8] The court in *Dillingham* defined the "issue presented" in the same essential terms as the issues presented herein:

(Footnote continued)

> "Contractors who are awarded public works projects agree to pay prevailing wages to all their construction employees at the journeyman level in specified trades. Public works contractors that employ apprentices can pay them an amount lower than the prevailing journeyman wage so long as those apprentices are part of an approved apprenticeship program under California Labor Code Section 1777.5" (*Id.*, 57 F.3d at 715, footnotes omitted)[9]

This statutory scheme "'has the effect, and possibly the aim' of encouraging participation in state-approved ERISA plans while discouraging" -- or, as here, flatly forbidding -- "participation in unapproved ERISA plans." Such effect is therefore impermissible under ERISA and the Constitution, and is not "saved" by ERISA's savings clause. *Dillingham*, 57 F.3d at 719.

> "If a state is permitted to use a prevailing wage scheme to single out certain ERISA plans over other ERISA plans, the potential for abuse is great -- a state could avoid ERISA's preemption provision and covertly disturb or alter ERISA plans...."

Id. 57 F.3d at 719, *quoting National Elevator Indus., Inc. v. Calhoon*, 957 F.2d 1555, 1559 (10th Cir.), *cert. denied*, 113 S.Ct. 406 (1992).

Because *Dillingham* and *Calhoon* each held State apprenticeship provisions of prevailing wage laws in the States of

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> "The issue presented in this case is whether ERISA preempts the application of a state prevailing wage law that requires payment of prevailing wages to employees in apprenticeship programs that have not received state approval but allows the payment of lower apprenticeship wages to employees participating in state approved programs. We hold that it does." *Id.*, 57 F.3d at 715.

[9] In *Dillingham*, as here, the IBEW was the union benefiting from the State's enforcement of the barriers to employment in skilled trades used to preserve the union's "turf" and to control "entry." Similarly, IBEW locals were also admonished for their discriminatory apprentice criteria, *E.E.O.C. v. JAC,* and for their apparent manipulation of the State's prevailing wage law "to achieve selfish ends." *See General Elec. Co. v. New York State Dep't of Labor*, 936 F.2d 1448, 1457 (2d Cir. 1991). Such unions, and Respondent herein, seek to preserve the status quo of state-sanctioned barriers to entry despite their negative impact on Federal policy and the growing chorus of Federal decisions invalidating these laws.

California and Oklahoma, respectively, to be preempted by ERISA,[10] they are in direct conflict with New York's application of Section 220. Respondent's contrary assertion that there is no "conflict" between the Federal Courts of Appeals and New York (Resp. Br. at 11) appears frivolous. Respondent's argument that it should be permitted to regulate where it is barred because the State's highest court "did not address" the issue, merely demonstrates the need for TAP's petition to be granted: without review, New York will continue to apply Section 220 in a manner barred by Federal law.[11]

Moreover, New York's Court of Appeals *did* address the Constitutional validity of Section 220, by dismissing TAP's appeal in its February 21, 1995 decision "upon the ground no substantial constitutional issue is directly involved" (*TAP IV*) (A-1[12]). The Court of Appeals thereby enforced the Commissioner's Orders, to the extent not annulled by the lower courts, as the law of New York. Such "inaction" is no less a final order reviewable herein. *Street v. New York*, 394 U.S. 576, 579-80 (1969) (Constitutional issue properly before this Court despite N.Y. Court of Appeals' failure to pass upon it).

Further, as detailed below, TAP has fully preserved this important claim at every stage of these proceedings (*see* C-1-29), and it is therefore properly before this Court of last resort.

I. TAP HAS PROPERLY PRESERVED FOR REVIEW ITS ERISA PREEMPTION CLAIM HEREIN

Respondent's assertion that TAP failed to preserve its ERISA preemption claim herein rests on Respondent's rewriting of

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[10] *See also* cases cited at Petition p.7, n.7, holding preempted similar apprenticeship provisions of Minnesota, Nevada, and Michigan prevailing wage laws.

[11] Since the Federal Courts declined to hear this matter on the ground that TAP had initially sought review in the State court system, this Court offers the only opportunity for review. *See* unreported decision of Mischler, J., *TAP Elec. Contracting Service, Inc. v. Hartnett, et al.*, No. 90-0083, (E.D.N.Y. June 25, 1990), *aff'd*, Nos. 90-7645 and 91-0201 (2d Cir. Jan. 16, 1992).

[12] References to appendices A and B attached to the Petition are denoted herein by (A-[page]) and (B-[page]), respectively. References to Respondent's brief in opposition to the Petition are denoted herein by (Resp. Br. at [page]).

TAP's "claim." TAP's "claim" herein is and has always been that the Commissioner's October 31, 1989 Order (A-28-37)(as modified by his February 6, 1991 Order)(A-10-14) is *null and void in its entirety because it is preempted by ERISA* (C-1, 3). In addition, there is no dispute that TAP asserted ERISA preemption of Section 220's "supplement" provisions from the outset, as Respondent concedes (Resp. Br. at 3; C-4), and that the term "supplements" is specifically defined in Section 220(5)(b) to include "apprentice training" (B-6). Further, the Appellate Division agreed that the "joint education fund" which funds TAP's training program, is "covered and governed by ERISA" (A-24-25), indirectly encompassing the issues herein.

A. TAP Asserted ERISA Preemption in its Initial Judicial Challenge as to the Entirety of the Commissioner's Order

TAP's initial judicial challenge to the Commissioner's 1989 Order, in its Statement of Issues presented (C-3) stated:

> "5. Petitioner seeks an order *reviewing and annulling the Order and Determination* of the Commissioner.... *Vacatur is sought on the grounds, inter alia, that the Order and Determination is preempted by the Employee Retirement Income Security Act of 1974*, that the Commissioner of Labor lacked subject matter jurisdiction....
>
> 6. *This proceeding seeks review and vacatur of each and every part of the Order and Determination*, dated October 31, 1989...." (C-3) (emphasis added)

Thus, TAP directly raised its claim that ERISA preempted all parts of the Commissioner's Order applying Section 220. Despite this reality, in an effort to fashion a "no preservation" argument, Respondent has sought to fragment TAP's petition into separate claims for each element of the Commissioner's Order (Resp. Br. at 3-4, 5: "TAP did not raise the issue of ERISA preemption with respect to the trainee claims...").

The now more limited scope of the issue presented herein is the result of TAP's successful challenge to the balance of the Commissioner's Orders. Because TAP's ERISA preemption challenge to the entirety of the Commissioner's Order was in

large part successful (*see "TAP I"* and *"TAP III"*; A-2 and A-22), Respondent's "non-preservation" argument rings hollow; TAP merely seeks review herein of the remainder of TAP's ERISA preemption claim, i.e., that portion of the Commissioner's application of Section 220 -- the apprenticeship provisions -- that the Court of Appeals' declined to vacate.[13]

This Court has rejected Respondent's premise that each separate "argument" is itself a "claim" that must have been preserved below. In *Street v. New York*, 394 U.S. at 583, this Court held that an issue as to which review is sought can be raised below "in various ways":

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." (*Id.*, 394 U.S. at 584)

Similarly, Respondent's contention that each "argument" must have been raised below in identical terms as are presented here (Resp. Br. at 10, n.7) was recently rejected by this Court in *Yee v. Escondido*, 503 U.S. 519, 112 S.Ct. 1522 (1992):

> "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise argument they made below. Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate claims. *They are rather separate arguments in support of a single claim* -- that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, *petitioners could have formulated any argument they liked*

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[13] TAP also urges that all of the Commissioner's proceedings in this matter *themselves* constituted an impermissable intrusion into areas reserved by ERISA for exclusive for Federal regulation. 29 U.S.C. 1144(c); *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320, 329 (2d Cir. 1985), *aff'd* 477 U.S. 901 (1986).

in support of that claim here." (*Id.*, 112 S.Ct. at 1532, citations omitted.) (emphasis added)

Nor is TAP bound to have presented the issue in the same terms as it was presented below, because "[t]he petitioner can generally frame the question as broadly or narrowly as he sees fit....without being limited to the manner in which the question was framed below." *Id.*, 112 S.Ct. at 1932. TAP, having plainly raised ERISA preemption of the Commissioner's Orders in their entirety throughout these proceedings, can properly narrow the issue herein to ERISA preemption of the only surviving aspect of those Orders: the application of Section 220's apprenticeship provisions.

B. TAP Asserted and Preserved the Specific Argument Herein as to ERISA Preemption of Section 220's Apprenticeship Provisions.

TAP not only preserved its claim of ERISA preemption with respect to Section 220 generally as applied in the Commissioner's Order, but also preserved its ERISA preemption argument specifically with respect to the apprenticeship provisions (*see* C-6, 7-10).

Upon hearing TAP's initial petition, the Appellate Division *annulled* the portion of the Commissioner's decision forbidding TAP from using Federal "trainees" rather than state-registered "apprentices" (A-22-25). When the Commissioner cross-appealed the decision, *TAP specifically argued that ERISA preempts Section 220's apprenticeship provisions* in response (C-6, 7-10). Thus, Respondent concedes (Resp. Br. p. 10, n.7) that TAP argued ERISA preemption of this precise aspect of the Commissioner's Order on pages 53-57 of its responsive brief to the Court of Appeals when Respondents cross-appealed (*id.*). Accordingly, TAP raised and preserved this issue specifically. *See Taylor v. Illinois*, 484 U.S. 400, 407 n. 9 (1988) (issue properly preserved where raised with specificity only upon appeal).

Respondent's reliance on the statement in the 1990 decision of the Court of Appeals (A-16), that the "only argument preserved for review in these cross appeals" was the issue of whether the apprenticeship provisions were preempted by the

Federal Aid Highways Act, is not determinative, for each of several reasons. *First*, Federal law governs the question of "preservation" for review before this Court:

> "The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." (*Street v. New York*, 394 U.S. at 583)

Second, Respondent's interpretation of the Court of Appeals' statement is contrary to established New York law, which holds that questions of pure statutory interpretation, as here, *may always be raised on appeal at any level*, even if raised in the first instance before the Court of Appeals.[14] *See e.g.*, *Richardson v. Fiedler Roofing, Inc.*, 67 N.Y.2d 246, 251, 502 N.Y.S.2d 125, 127 (1986) ("The argument raises solely a question of statutory interpretation, which we may address even though it was not presented below"); *accord*, *American Sugar Refining Co. v. Waterfront Comm.*, 55 N.Y.2d 11, 25, 447 N.Y.S.2d 685, 691 (1982). Similarly, in *People v. McDonald*, 68 N.Y.2d 1, 505 N.Y.S.2d 824 (1986), the defendant advanced a new legal issue for the first time on appeal to the Court of Appeals, going to the Court's jurisdiction -- like the ERISA preemption arguments herein. It is the law of New York that such issue may be heard:

> "Because [the newly-raised issue of] appealability goes to the subject matter jurisdiction of the court ... *which may be raised for the first time on appeal to this Court*

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[14] *Third*, because the Court of Appeals dismissed both parties' requests for appeal as of right, "upon the ground that the order appealed from does not finally determine the proceeding" (*see* A-20-21) (Resp. Br. at 5, n. 4), TAP's constitutional challenge must have been deferred until a "final order" had issued from the Appellate Division, which did not occur until August 29, 1994 (*TAP III*) (A-2). There is no dispute that, following the remittitur, upon subsequent appeal to the Appellate Division, TAP extensively briefed the very aspect of TAP's preemption claim as is asserted herein. (*See* TAP's May 8, 1992 moving brief to the Appellate Division, pp. 27-34 (attached as C-11-18)). While the Appellate Division declined to disturb the Court of Appeals' 1990 decision in this regard (A-7), it cannot seriously be argued that the issue was not raised (*see also* C-19-26, 27-29).

> ... the fact that defendant failed to move before the Appellate Division to dismiss the People's appeal presents no obstacle to our consideration of the question." (*Id.* 68 N.Y.2d at 9, n.9, 505 N.Y.S.2d at 831n.9) (citations omitted) (emphasis added)

Accordingly, the important questions presented for review herein were raised below and properly preserved for review both by challenge to the entirety of the Commissioner's Orders under ERISA and by specific reference to the argument presented herein.[15]

CONCLUSION

For the foregoing reasons, TAP respectfully requests that its Petition for a Writ of Certiorari be granted.

August 4, 1995

Respectfully Submitted,

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[15] Further, this Court may address the important issues raised herein, in its discretion. *Carlson v. Green*, 446 U.S. 14, 31, n.2 (1980); *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

APPENDIX

VERIFIED PETITION

November 14, 1989

The petition of TAP ELECTRICAL CONTRACTING SERVICE, INC., ("Petitioner" or "TAP"), respectfully shows to this Court and alleges:

* * *

3. This is a proceeding to set aside, vacate and annul respondent's Determination and Order dated October 31, 1989, which held that Petitioner wilfully violated Section 220 of the Labor Law by failing to pay prevailing rates of wages and supplements under a contract with the New York State Department of Transportation for lighting replacement on the Northern State Parkway in that it classified and paid three individuals as trainees, that it failed to pay prevailing supplements to or on behalf of 28 employees in that it claimed credit for the full course of apprentice training in accordance with the training program and curriculum certified by the New York State Department of Labor, in that it calculated vacation benefits on the basis of per hours worked for each hour worked by said employees and that it maintained an excessive number of apprentices in violation of the applicable journey level/apprentice ratio for the project.

* * *

5. Under these circumstances, the United States Supreme Court has held that the Federal Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Section 1144 (a) preempts State Prevailing Wage Law in the case of *Local Union 598, Plumbers and Pipe Fitters Industry Journeymen and Apprentices Training Fund v. J.A. Jones Construction Company,* 109 S.Ct. 210 (1988).

The scope and extent of the apprentice training program, including hours of work to be assigned and specific areas of electrical construction trade, topics for related instruction and required text books and technical codes are training requirements issued by the Department of Labor after negotiations

with the program sponsor and made part of the contract for apprentice training to which the Petitioner subscribes. . . .

* * *

9. The record is clear that the Davis Bacon Act and related administrative decisions preempt New York State Labor Law in the matter of the use of trainees under United States Department of Transportation Programs and that "ERISA" preempts the New York State Labor Law to the extent that Section 220 is used to have Petitioner pay more than what is required by its collective bargaining agreements and more than what is paid for for the analogous prevailing benefits [and] insofar as the state statute as administered by the Department of Labor purports to regulate contributions for the aforementioned benefits.

* * *

WHEREFORE, Petitioner respectfully requests a judgment pursuant to Article 78 of the Civil Practice Law and Rules:

1. Staying and enjoining Respondent Department of Labor from entering Petitioner's name to the List of Employers ineligible to Bid on or be Awarded any Public Work pending hearing and determination of this proceeding;

2. Reviewing and annulling the subject determination and order of respondence dated October 31, 1989 and filed November 8, 1989;

3. For such other and further relief as to this Court may deem just and proper.

C-3

NEW YORK SUPREME COURT

APPELLATE DIVISION—SECOND DEPARTMENT

BRIEF ON BEHALF OF PETITIONER-APPELLANT

December 11, 1989

* * *

STATEMENT OF ISSUES PURSUANT TO CPLR 5531

* * *

5. Petitioner seeks an order reviewing and annulling the Order and Determination of the Commissioner of Labor of the State of New York, dated October 31, 1989 and filed November 8, 1989, which determined, *inter alia*, that petitioner wilfully violated Article 8 of the Labor Law. Vacatur is sought on the grounds, *inter alia*, that the Order and Determination is preempted by the Employee Retirement Income Security Act of 1974, that the Commissioner of Labor lacked subject matter jurisdiction, and that the Order and Determination is arbitrary, capricious and not supported by substantial evidence on the record. Petitioner also seeks an order enjoining respondent from enforcing the Order and Determination pending final resolution of this proceeding.

6. This proceeding seeks review and vacatur of each and every part of the Order and Determination, dated October 31, 1989 and filed November 8, 1989, of Thomas F. Hartnett, Commissioner of Labor of the State of New York.

* * *

PRELIMINARY STATEMENT

[p. 1]

This Article 78 proceeding seeks to set aside an order and determination of the Commissioner of Labor enforcing provisions of Section 220 of the Labor Law that have just been

held by the Second Circuit to be preempted by federal law. *General Electric Company v. N.Y. State Department of Labor*, No. 88-7922 (2d Cir. Nov. 29, 1989). Given that the Commissioner has precipitously debarred petitioner from being awarded any public contracts — a step that could be fatal to petitioner's business which is virtually one hundred percent public work — to immediate intervention of this Court is required in order to avert egregiously unjust and irreparable harm.

* * *

[ARGUMENT]

[p 8]

POINT I.

THE COMMISSIONER'S DETERMINATION THAT TAP FAILED TO PAY PREVAILING SUPPLEMENTS MUST BE SET ASIDE BECAUSE THE RELEVANT PROVISION OF SECTION 220 OF THE LABOR LAW IS PREEMPTED BY ERISA.

* * *

[p 12]

B. Application of *General Electric* Requires That the Determination Here Be Vacated

* * *

COURT OF APPEALS
STATE OF NEW YORK

PETITIONER-APPELLANT'S REPLY BRIEF AND BRIEF IN OPPOSITION TO RESPONDENT'S APPEAL

April 23, 1990

* * *

COUNTER-QUESTIONS OF LAW PRESENTED FOR REVIEW

* * *

(3) Whether Section 220, as applied by the Commissioner in this case, is preempted by the Employee Retirement Income Security Act of 1974 because it relates to and regulates the operation of an ERISA-covered apprenticeship and training plan.

* * *

[ARGUMENT]

[pp. 29-30]

IV. AS THE APPELLATE DIVISION CORRECTLY CONCLUDED, TAP'S USE OF USDOL TRAINEES ON A FEDERALLY FUNDED PROJECT AT FEDERALLY-APPROVED WAGE RATES WAS LAWFUL.

The Commissioner of Labor determined that Section 220 of the Labor Law prohibited TAP from employing three USDOL trainees at federally approved wage rates on the Northern State Parkway project, which was funded principally by the federal government. The Appellate Division's decision vacating that determination is correct and should be affirmed for several independent reasons.

First, the Commissioner's interpretation of Section 220 — which creates a conflict with federal law and undermines the

federal presence in the important area of skills training for minorities and women in the highway construction industry — is neither required by the terms of the statute nor intended by the Legislature. It is also contrary to the well-established principle that state law should, whenever possible, be construed in a manner that *avoids* conflict with federal law. The Commissioner's interpretation of Section 220 is, therefore, incorrect as a matter of statutory construction.

Second, if the Commissioner's interpretation is correct, Section 220 is, to that extent, preempted by the Federal-Aid Highways Act ("FAHA"). The FAHA, together with the regulations promulgated thereunder, establishes federal affirmative action training goals and the means the federal government has selected for achieving those goals — including the payment of trainee wage rates. As interpreted by the Commissioner, Section 220 is an obstacle to the accomplishment of the full purposes and objectives of the FAHA and, accordingly, is preempted.

Third, as applied by the Commissioner in this case, Section 220 is preempted by the Employee Retirement Income Security Act of 1974. State law is preempted by ERISA to the extent it "relates to" an ERISA-covered employee benefit plan. TAP's training and apprenticeship program, under which the USDOL trainees were employed, is an employee benefit plan within the meaning of ERISA. Section 220, as applied by the Commissioner, "relates to" that plan and therefore is preempted by ERISA because, by prohibiting the use of USDOL trainees at wage rates provided for in the plan, it directly alters the terms of the plan, including its wage rates and eligibility criteria.

* * *

[pp. 53-57]

D. As Applied By The Commissioner Here, Section 220 Relates To An Employee Benefit Plan And, Therefore, Is Preempted By ERISA.[29]

Section 514(a) of ERISA provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 1003(a) of this title. . . ." 29 U.S.C. § 1144(a). As pointed out in TAP's main brief, the Supreme Court has stressed that "the express preemption provisions of ERISA are deliberately expansive." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987). This is plain not only from the terms of the statue but also from its legislative history — which evidences a Congressional intent to "eliminat[e] the threat of conflicting or inconsistent State and local regulation of employee benefit plans" and to apply the preemption principle "in its broadest sense to all actions of state or local governments . . . which have the force or effect of law." *Id.* at 46 (*quoting* 120 Cong. Rec. 29933 (1974)).

TAP employed its trainees pursuant to an apprenticeship and training program administered by the Joint Apprenticeship and Training Council, of which TAP is a member. The program, described in Articles 33 and 34 of TAP's collective bargaining agreement with Local 363 (Resp. Exh. 15 at 27-34, A. 130-137), provides training for both state-registered apprentices and USDOL trainees. Funding for the program is provided by a "Joint Educational Fund" to which TAP is required by the collective agreement to pay 3 1/2 percent of its gross wage payroll. Apprentice and trainee program participants are paid pursuant to a program wage scale under which "apprentices and trainees working on the same job site . . .

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[29] Although the Appellate Division did not expressly reach this issue, it is properly before this Court as an additional rationale for affirming the Appellate Division's decision to annul the Commissioner's order and determination with respect to TAP's use of trainees. *See Sega v. State of New York*, 60 N.Y.2d 183, 190 n.2 (1983).

receive identical wages and benefits." (Resp. Exh. 15 at 33, A. 136)

There can be no question that TAP's apprenticeship and training program is an employee benefit plan within the meaning of ERISA, 29 U.S.C. § 1002(1).[30] *See Local Union 598 v. J.A. Jones Const. Co.*, 846 F.2d 1213 (9th Cir.), *aff'd mem.*, 109 S. Ct. 210 (1988); *Hydrostorage, Inc. v. N. Cal. Boilermakers Local Joint Apprenticeship Comm.*, 891 F.2d 719 (9th Cir. 1989); *Associated Builders and Contractors, Inc. v. McDonald*, CV-N-89-409, 1989 U.S. Dist. Lexis 16401 (D. Nev. 1989); Decision at 3, A. 4. It is equally clear that Labor Law § 220, and the Commissioner's order applying it, are "state law" under ERISA. *See* 29 U.S.C. § 1144(c)(1).

A state law "relates to" an employee benefit plan, and accordingly is preempted under Section 514(a) of ERISA, "if it has a connection with or reference to such a plan." *Shaw v. Delta Airlines*, 463 U.S. 85, 96-97 (1983) (citation omitted). As applied by the Commissioner in this case, Section 220 plainly "relates to" TAP's ERISA-covered apprenticeship and training program.

First, as interpreted by the Commissioner, Section 220 directly regulates the substantive terms of TAP's training program. By requiring that trainees be paid journey-level wages, Section 220 abrogates the program's wage schedule for trainees and, at the same time, requires that training program

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[30] The statute defines "employee welfare benefit plan" in pertinent part as follows:

> Any plan, fund or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . apprenticeship or other training programs . . . .

29 U.S.C. § 1002(1).

participants be paid at a rate established by the Commissioner of Labor. ERISA, however, having "preempted the field" of employee benefit plan regulation, preempts state laws that regulate the substantive terms of employee benefit plans. *See Shaw v. Delta Airlines*, 463 U.S. 91 (1983); *General Electric Co. v. New York State Department of Labor*, 891 F.2d 25 (2d Cir. 1989).

Accordingly, Section 220 "relates to" an employee benefit plan and is preempted by ERISA to the extent it requires TAP to pay training program participants at a wage rate other than that specified in the training program wage schedule. *See Hydrostorage, Inc. v. N. Cal. Boilermakers Local Joint Apprenticeship Comm., supra*, 891 F.2d 719; *Associated Builders and Contractors, Inc. v. MacDonald, supra.*

Section 220, as applied by the Commissioner, further "relates to" an ERISA-covered plan because it has the effect of regulating the eligibility requirements for participation in TAP's apprenticeship and training program. According to the terms of the plan, two groups of individuals are eligible to participate in the program: (1) federally-approved trainees; and (2) state-registered apprentices. Under the Commissioner's interpretation of Section 220, however, USDOL-approved trainees are effectively prevented from participating in the plan. *See* pp. 35-38, *supra.*

There is no question that Section 220 would be preempted if it directly regulated the eligibility criteria for the apprenticeship and training program. *See* pp. 53-55, *supra*. That the state accomplishes this prohibition indirectly (*i.e.*, by requiring the payment of journey-level wages as a prerequisite to participation) does not make it any less a regulation preempted by ERISA. It is well-established that the state is preempted from doing indirectly what it may not do directly. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987); *Wisconsin Department of Industry v. Gould, Inc.*, 475 U.S. 282 (1986); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile*, 450 U.S. 311, 325-26 (1981).

* * *

In sum, the Commissioner's interpretation of Section 220 as prohibiting the use of USDOL trainees on federally funded projects at wage rates approved by the federal government is an unreasonable and insupportable construction of the statute. If this Court should conclude, however, that such an interpretation is compelled, then Section 220 is preempted by the FAHA and, in the factual circumstances presented here, by ERISA as well.

* * *

NEW YORK SUPREME COURT

APPELLATE DIVISION—SECOND DEPARTMENT

PETITIONER-APPELLANT'S BRIEF

May 8, 1992

* * *

STATEMENT OF ISSUES PURSUANT TO CPLR 5531

* * *

5. This appeal, which arises after a remittitur from this Court, affirmed and remanded by the Court of Appeals, *TAP Electrical Contracting v. Hartnett*, 156 A.D.2 612, 549 N.Y.S.2d 118 (2d Dept. 1989), *aff'd in part, rev'd in part*, 76 N.Y.2d 164 (1990), seeks reversal of a debarment order issued under New York Labor Law § 220 and presents substantial and important issues regarding the application of Labor Law § 220:

> (1) whether the Commissioner's order upon remission is unconstitutional as preempted by the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq* ("ERISA"), which preempts state laws that relate to plans governed by ERISA. *See General Electric v. Department of Labor*, 891 F.2d 25, 29-30 (2d Cir. 1989), *cert denied*, 110 S. Ct. 2603 (1990), *on remand*, 936 F.2d 1448 (2d Cir. 1991);
>
> * * *
>
> (3) whether the Commissioner's Order constitutes a state regulation of trainee wages pursuant to a prevailing wage law that is preempted by ERISA. *See Electrical Joint Apprenticeship Committee, et al. v. MacDonald*, 949 F.2d 270 (9th Cir. 1991) (Decided Nov. 8, 1991) ("*MacDonald*"). (While this Court's earlier unanimous decision (549 N.Y.S.2d 118) was reversed by the Court of Appeals (76 N.Y.2d 164) pursuant to *Monarch Electrical*

Contracting v. Roberts, 70 N.Y.2d 91 (1987), *MacDonald* necessitates invocation of the supremacy clause of the United States Constitution);

* * *

STATEMENT OF QUESTIONS ON APPEAL

* * *

2. Whether the Order appealed from is void as impermissably relating to an employee benefit plan, subject to the Employee Retirement Income Security Act ("ERISA"), and therefore is preempted by ERISA § 514 for any of the following reasons:

(a) it applies a portion of petitioner's cash payments to supplements provided by petitioner through its ERISA plans;

(b) it imposes a state registration requirement for petitioner's ERISA apprenticeship program in excess of the requirements imposed by the National Apprenticeship Act;

(c) it purports to regulate the ratio of apprentices to journeymen in petitioner's ERISA training program; or

(d) it requires petitioner to make contributions or payments equivalent to those required by a local union's ERISA plans.

* * *

6. Whether the order debarring petitioner from bidding on or being awarded public work contracts is *void ab initio* where it is premised upon an arbitrary and capricious, federally preempted or unconstitutional application of a state statute, or where the statute is facially unconstitutional.

* * *

[ARGUMENT]

[pp. 27-33]

B. ERISA Preempts DOL's "Registration" Requirements for Apprenticeship Programs; DOL Can Not Refuse to Recognize Federally-Approved "Trainees" as Equivalent to State-Registered "Apprentices."

1. The United States Department of Labor Approved TAP's Training Program

TAP employed three federally-approved "trainees" hired through, and paid at the rates set forth in, a training plan approved by the Federal Highway Administration and the New York State Department of Transportation. (App. 350). TAP's training plan was administered jointly with Local 363 of the International Brotherhood of Teamsters/Joint Apprentice Committee ("Local 363 IBT/JAC"), and employed only certified participants in a U.S. Department of Labor ("USDOL") training program (App. 350; 354; 417-19; 440).

The Plan was approved by the U.S. Bureau of Apprenticeship and Training ("BAT") pursuant to the requirements of the Fitzgerald Act. (App. 418-19; 440; *see* 76 N.Y.2d 164.)[33] TAP's contract with DOT *required* use of federally-approved trainees (App. 417-421), and even subsidized their use (App. 406). Nevertheless, the Commissioner's 1989 Order found that TAP violated Section 220 by paying the three trainees as apprentices because this federally-approved program was not additionally "registered" as a state-approved apprenticeship program.[34]

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[33] It is also undisputed that both the Federal Highway Administration ("FHWA") and New York State's Department of Transportation approved TAP's training proposal, including its wage rates, and incorporated it in the project contract. (App. 417-19).

[34] The N.Y. Court of Appeals in *Monarch Elec. Contracting Corp. v. Roberts*, 70 N.Y.2d 91, 517 N.Y.S. 2d 711 (1987), discussing the very USDOL

(Footnote continued)

2. TAP's Training Program Was an Employee Benefit Plan Under ERISA.

TAP's training program, the Local 363 IBT/JAC, through which TAP employed three trainees, is an ERISA-covered plan and is financed by an ERISA-covered trust fund, the Local 363 Joint Education Fund. The Local 363 Joint Apprenticeship Committee sets the rules and regulations governing eligibility, participation, education and operation of the trainee program.

ERISA expressly covers apprenticeship programs such as TAP's, as an "employee welfare benefit plan", which includes "*apprenticeship or other training programs*". 29 U.S.C. § 1002(1) (emphasis added). TAP's IBT/JAC training program is therefore an employee welfare benefit plan under ERISA. *See Hydrostorage, Inc.*, 891 F.2d at 726-27; *J.A. Jones*, 846 F.2d at 1217.

3. DOL Interprets Section 220 to Impose the Additional Requirement of State Registration Upon Federally-Approved Training Programs.

The Commissioner found, in his 1989 Order, that "TAP's underpayment of prevailing wages and supplements to three individuals it classified as 'trainees' on the project was a willful violation of Article 8 [Section 220(3-e)] of the Labor Law." (App. 337) It based this conclusion on the Hearing Officer's Report that:

(. . . continued)

training program in which TAP's employees participated, noted that, "[a]s found by the hearing Officer, the Federally registered trainee programs and the State registered apprenticeship programs are *virtually identical* in wages, on-the-job training and related classroom instruction. The only significant difference between them is in the entrance requirements. The requirements of the trainee programs are job-related and much less stringent than those of State-approved apprentice programs, having been designed to promote minority group participation." (70 N.Y.2d at 97) (emphasis added).

> Section 220(3) of the Labor Law is very clear and unambiguous in its recognition of only two classifications of workers, journeymen and apprentices. Section 220(3-e) clearly states that only those individuals *registered* in a bona fide apprenticeship program with the *New York State Department of Labor* shall be paid apprentice-level wages. Any employee not registered in such a program 'shall be paid [journeyman rates].'

(App. 365).

Because none of the three federally-approved trainees were "enrolled in . . . an apprenticeship program *registered* with the New York State Department of Labor," (App. 364) the Commissioner held that TAP was required to pay them at journeyman payscale, and had thus "underpaid" them for that period. (App. 337). Had the Local 363 IBT/JAC program been registered with the DOL, there would have been no underpayment of wages.

4. ERISA Preempts State-Imposed Registration Requirements on Federally-Approved Fitzgerald Act Training Programs.

DOL applied Section 220 to impose a registration requirement over and above the requirements for training programs set by the Federal Government. This is proscribed by however under federal law because "*any State regulation of apprenticeship programs that is separate and apart from the authorization given by the Fitzgerald Act and its accompanying regulations is preempted by ... ERISA*." *MacDonald*, 949 F.2d at 274 (emphasis added).[35] Any denial of exemption

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[35] The Fitzgerald Act regulations establish U.S. Department of Labor oversight for administering registration and approval of apprenticeship programs under the aegis of the BAT, Employment and Training Administration. 29 C.F.R. § 29.1; *Id.* The Fitzgerald Act regulations, 29 C.F.R. §§ 29.3(a) and (b), provide for a "dual system of approval and recognition" for apprenticeship programs, allowing *either* State Apprentice

(Footnote continued)

from prevailing wages under State law to a USDOL approved apprenticeship program, effectively asserts State-law standards over the program in contravention of ERISA, because a "program that meets the requirements of the Fitzgerald Act [meets] *the only apprenticeship regulations that are permissible as not being preempted by Section 514(a) of ERISA*." 949 F.2d at 274. (emphasis added).

Thus, as a matter of federal law, any interpretation of the State prevailing wage law that imposes additional standards or requirements in excess of those mandated by Federal law, is an application that "compels preemption." *Id.* While the Ninth Circuit's permanent injunction only enjoined the Nevada Labor Commissioner from enforcing that state's prevailing wage statute, *id.*, given the virtual identity between the Nevada and New York statutes in this regard, the same result must obtain here.[36]

The operative facts in *MacDonald* are also indistinguishable from the facts here. The Commissioner may not lawully refuse -- as he has -- to treat as the equivalent of

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(. . . continued)

Councils or the Federal Bureau to approve an apprenticeship program for Federal purposes. However, it is clear that "*either agency is constrained in its approval to apply the requirements and standards of the Federal regulations*." 949 F.2d at 273 (emphasis added).

[36] The Nevada statute provided an exemption from public works prevailing wage rates for "apprentice programs approved by the State Apprenticeship Council, but [did] not allow such exemption for apprenticeship programs approved by the Bureau of Apprenticeship and Training of the United States Department of Labor." (Nevada Rev. Stat. §§ 339,010 - 338,090.)

There, as here, employers on public works projects were constrained to pay trainees in federally approved programs full journeymen wages, despite their USDOL approval, merely because the program did not meet the additional requirement of State approval. The Court noted that "prevailing wage statutes for public work, present a significant obstacle, unless apprenticeship programs are exempted" because "for an apprenticeship program to work, it is essential that the employer pay lesser wages to apprentices while they are in training." 949 F.2d at 274.

state-registered apprentices any of TAP's participants in its training program which is approved by the USDOL pursuant to the Fitzgerald Act, by imposing State registration or other State standards "separate and apart from the authorization given by the Fitzgerald Act." Those additional State law requirements impermissibly "relate to" or "purport to regulate"[37] an ERISA-covered plan, and are preempted.[38]

5. Federal Training Programs Further the Compelling National Policy of Combatting Discrimination in the Construction Industry.

The purpose served by ERISA preemption as described in *MacDonald* is significant: It breaks down state barriers to minority employment in the construction industry. (*Cf. Monarch*, 70 N.Y.2d at 97-98, where the Court held that it was not its province to correct the inequitable treatment of minority persons denied entrance to the state-registered apprenticeship programs). Indeed, the United States Supreme Court has observed that the "[j]udicial findings of exclusion from craft [unions] on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." *United Steelworkers of America v. Weber*, 443 U.S. 193, 198 n.1 (1979).

Section 220, as applied herein by DOL, "unexpectedly frustrates the very important policy of reducing discrimination

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[37] Indeed, here, DOL purports to regulate, through Section 220, TAP's ERISA trainee plan by purporting to regulate, directly or indirectly, the terms and conditions under which trainees in the plan are employed, their payscale, and indeed, their very employment itself. *See also Hydrostorage*, 891 F.2d at 729-32 (state apprenticeship standards preempted by ERISA because they regulate "indirectly but substantially," an ERISA plan).

[38] While the Court of Appeals affirmed the violation in this regard on the interim appeal on other grounds, it did not address the issues raised herein -- ERISA preemption of the application of the Statute. Since the Court of Appeals in *Monarch* recognized the unfortunate consequences of this aspect of Section 220, TAP respectfully urges reconsideration of the prior decision, in light of *MacDonald*.

in the construction labor force." 70 N.Y.2d at 99. While state registration of apprentice programs once served the worthy goal of eliminating "sham" programs, it now serves only to perpetuate -- with judicial acquiescence -- exclusionary strangleholds over entry-level participation in employment training programs. Since the New York's Court of Appeals has recognized that the USDOL training program in which TAP's employees participated was part of a "compelling policy" by the federal government "to remedy the effects of ... longstanding discrimination in the construction industry," *Monarch*, 70 N.Y.2d at 97,[39] TAP's participation therein should not be held to have created a violation of Section 220. Accordingly, there is every reason for this Court to apply the holding and rationale of the *MacDonald* case herein.

C. DOL's Purported Regulation of Apprentice/Journeymen Ratios Is Preempted by ERISA.

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[39] The N.Y. Court of Appeals in *Monarch* "regrettably" observed that the State Legislature, in enacting the apprentice-registration provisions of Section 220 "did not likely foresee that bona fide, federally approved trainee programs ... would be rejected as acceptable pools of learning-level workers. Nor could it have foreseen that, by prohibiting the payment of apprenticeship wages to unregistered apprentices, it was also prohibiting the payment of apprenticeship wages to 'trainees' enrolled in these federally administered programs, and thus anomalously requiring that these 'trainees' be paid a wage four times greater than that paid to their counterpart 'apprentices.'" (70 N.Y. at 98-99). As noted, TAP was contractually required to employ trainees in a federally-approved program (App. 417-421).

In this regard, we note that it is well established and now a federal law (the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)) that facially neutral employment practices that have a disparate impact on minority persons are unlawful. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In such circumstances, TAP respectfully submits that the court can no longer countenance legislative delay in eliminating these "unforeseen" consequences of Section 220.

NEW YORK SUPREME COURT

APPELLATE DIVISION—SECOND DEPARTMENT

PETITIONER-APPELLANT'S REPLY BRIEF

August 20, 1992

* * *

[ARGUMENT]

[pp. 14-21]

II. TAP's DEBARMENT BASED ON TRAINEE WAGES MUST BE RECONSIDERED IN LIGHT OF *MACDONALD* AND *CALHOUN*, AND IN LIGHT OF THE PROPER CREDITING OF TAP'S CASH PAYMENTS

A. Res Judicata Does Not Bar Consideration of *MacDonald* or *Calhoun*.

ERISA preemption pursuant to *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270 (9th Cir., 1991) *cert denied*, 112 S.Ct. 2991 (1992) and *National Elevator Industry v. Calhoun*, 957 F.2d 1555 (10th Cir. 1992), divests the court of jurisdiction to enforce any state registration or other requirements for state approval of training programs, that are in excess of those authorized by federal law. This preemption issue is essentially a "question of subject matter jurisdiction." *Nuernberger v. State of New York* 41 N.Y.2d 111, 115-17 (1976); *Little v. Dow Chemical Co., Inc.*, 559 N.Y.S.2d 788, 790 (Sup. Ct. Erie Cty 1990). "As such, preemption need not be pleaded, cannot be waived, *and may be raised at any point in the course of litigation*". *Little*, *supra* at 790 (emphasis added), citing *Robinson v. Oceanic Steam Navigation Co.*, 112 N.Y. 315, 324. Accordingly, there can be no *res judicata* bar to hearing this argument, *Lacks v. Lacks*, 41 N.Y.2d 71, 75 (1976), and if successful, it may even render the Court of Appeals decision herein void to the extent it adjudicated matters outside the Court's proper jurisdiction. *Robinson*, *supra* at 324; see 21 C.J.S. Courts § 18 (1990).

Even if there could be a res judicata bar to a preemption issue, such would be inapplicable herein because the issue decided by the Court of Appeals is not the issue raised on this appeal. The New York Court of Appeals declined to review as of right any issues raised on appeal of this Court's 1989 decision herein on the grounds that "the order appealed from does not finally determine the proceeding within the meaning of the Constitution" (see Resp. Br., App. 011). While the Court did grant leave to appeal, it subsequently held that "[t]he only argument preserved for...review" was "whether the holding in *Matter of Monarch Electrical Construction Corp. v. Roberts*, 70 N.Y.2d 91 (1987) applies to construction projects jointly funded by the State and Federal governments under the [FAHA]". 76 N.Y.2d at 168. No other issue was reached or reviewed. Accordingly, there is no final determination herein except as to the above-referenced application of *Monarch*. TAP does not seek to relitigate that issue. Rather, TAP raises a completely different issue never before litigated in this or any other New York Court, to our knowledge, concerning ERISA preemption.[14]

Moreover, TAP respectfully submits that the compelling nature of the civil rights concerns involved herein mandate review of the merits of this issue.[15] As the Court of Appeals noted in *Monarch*, the USDOL training program at issue here is virtually identical to state-registered programs, except as to entrance requirements, which are "designed to promote minority group participation." 70 N.Y.2d at 97. Indeed, the very purpose of USDOL programs such as TAP's is to loosen the vice-grip of local trade unions over entry into skilled crafts, which have excluded minority workers for so long "as to

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[14] See Weinstein Korn & Miller, *New York Civil Practice*, ¶ 5011.11 p. 50-105, 106 (when issues are remanded in part, res judicata attaches only to those decided)

[15] See Title VII, Civil Rights Act of 1964, 42 U.S.C. §2000(e) *et seq.*; *Griggs v. Duke Power Co.* 401 U.S. 424, 1 (1971) (Title VII forbids otherwise lawful provisions that have a disproportionate adverse effect on minorities.)

make such exclusion a proper subject for judicial notice." *United Steelworkers of America v. Weber*, 443 U.S. 193, 198 n.1; *Monarch, supra*, 70 N.Y. at 98-99.

The *Monarch* Court recognized that the same federally-approved training program in which TAP's employees participated was part of the "compelling policy" to remedy the effects of ... longstanding discrimination in the construction industry," and "regretted" the apparently "unforseen" adverse effects of the state registration provisions of Section 220. *Id.* While the Court felt constrained to enforce the provisions of Section 220 as written as a matter of state law, at least until the legislature acts to alter them, 70 N.Y.2d at 98-99, it did not consider the impact of federal law on Section 220. However, since *GE I* and *GE II*, it is clear that Section 220 is not immune to federal law preemption. Thus, it is now established that in enacting ERISA, the federal legislature *has* acted to alter the application of state laws like Section 220.[16] ERISA is a comprehensive scheme of federal preemption over state regulation of employee welfare benefit plans, including TAP's ERISA-covered training program. *See e.g. Delta Air Lines v. Kamarasky*, 650 F.2d 1287, 1303 (2d Cir. 1981), *aff'd as mod.* 463 U.S. 85, 97 (1982). The *MacDonald* case makes clear that the ERISA scheme, including its "savings" clause for federal regulation of such programs, sets up a system by which both states and the federal government may regulate training programs, provided only that "either agency is constrained in its approval process to apply the requirements and standards of *federal* regulations." *MacDonald, supra*, 949 F.2d at 273 (emphasis added). Accordingly, MacDonald held that ERISA *preempts "any state regulation" of such programs* "that is separate and apart from," or in excess of, the regulations imposed by Federal law. *Id.* at 274. Stated conversely, any training program that meets federal

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[16] While two bills were introduced to change this aspect of ERISA preemption (S. 794; H.R. 2782), they did not pass the Congress.

approval, as TAP's program has, must also necessarily meet with state approval.[17]

The *MacDonald* analysis applies fully here. Respondent does not dispute that: (i) TAP's USDOL-approved training program is a welfare benefit plan subject to ERISA; (ii) the State DOL has enforced State registration requirements for TAP's program that exceed those set by the federal government for the same program; and (iii) if TAP's federally-approved program had met the additional requirement of state registration, TAP's trainees would have qualified for "apprentice" rates under Section 220. These conceded facts are virtually identical to the facts in *MacDonald*; the holding and compelling reasoning there mandates preemption of the additional state-registration requirements at issue here.

The distinction in terminology between state "apprentice" programs and state "training" programs relied upon by Respondent (a) is factually incorrect, as the USDOL letter attached for the Court's convenience as Addendum A hereto shows,[18] and (b) has no impact on the underlying rationale of *MacDonald*. However termed, states may not, consistent with ERISA, require that trainees in federally-approved training or apprenticeship programs be paid journeymen's wages as a means to effectively defeat their participation. See 949 F.2d at 274. The same is true for a state "registration" requirement beyond that imposed by federal regulations. Undergirding the *MacDonald* analysis is the reality that such additional state requirements -- whether intentionally or as an "unforeseen" consequence -- unfairly and selectively blockade entry to

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[17] "BAT approval is equivalent to state approval." *Id.* at 275.

[18] That "distinction" does not even apply here: on March 3, 1981, and at all relevant times thereafter, TAP's program was approved by the U.S. Department of Labor Bureau of Apprenticeship and Training under the "standards...and directives set forth in Title 29 CFR § 29 [Fitzgerald Act Regulations] 'Labor Standards for Registration of *Apprenticeship* Programs.'" (Addendum A, emphasis added). *See also MacDonald*, 949 F.2d at 272, n.1.

craft-worker trainees. See 949 F.2d at 272. Accordingly, ERISA preemption should be embraced by this Court as in *MacDonald* as the chariot to achieve the laudatory goals that the Court of Appeals was "regrettably" unable to achieve when "constrained" by a purely state-law analysis.

The two lower court cases relied upon by Respondent to distinguish *MacDonald*, *Dillingham Construction v. County of Sonoma*, 778 F.Supp. 1522 (N.D. Cal. 1991), and *Associated Builders and Contractors v. Curry*, 1992 WL 171906 (N.D. Cal. 1992), are inapplicable here because in neither case did the state agency apply standards for registration that exceeded those promulgated federally; rather those programs did not meet *federal* standards. Further, the *Curry* court expressly declined to follow the holding or reasoning of *GE I* and *II*, 1992 WL 171906 at 8, and thus may not be relied upon in this federal circuit. Thus, neither case vitiates the force of *MacDonald*. (*Dillingham* did not involve a training program that met federal approval (as here) -- the key fact in *MacDonald* that triggers the preemptive effect of ERISA is a state requirement that *exceeds* those promulgated federally; *Curry* involved a training program that did *not* meet federal approval by the Bureau of Apprenticeship and Training ("BAT") under the Fitzgerald Act, 29 U.S.C. § 50,[19] see 1992 WL 171906 at 3.) By contrast, here the DOL has, in fact, refused to recognize TAP's federally-approved and BAT-approved training program, and thus has by definition asserted requirements in excess of those required federally. Those excess requirements are preempted by ERISA. *MacDonald*, supra at 275.

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[19] Moreover, in *Curry*, the Court agreed that portions of the State's prevailing wage law "not saved by the Fitzgerald Act are pre-empted" 1992 WL 171906 at 10.

B. *Calhoun* Compels Preemption of Respondent's Application of Section 220 to Federally-Approved Training Programs.

The United States Court of Appeals for the Tenth Circuit has now added its voice to the chorus of circuits finding state prevailing wage laws that purport to regulate training programs preempted by ERISA. *Calhoun*, *supra*, 957 F.2d 1555 (10th Cir. 1992).[20] In *Calhoun*, the Tenth Circuit held that a state prevailing wage law could not "favor" one ERISA-covered training program over another, by permitting the approved program to pay its "helpers" (i.e., trainees) lesser, apprentice wages, while the disfavored plan was required to pay its "helpers" full "mechanic" (i.e., journeyman) rates. The Court held this application of the prevailing wage law held preempted by ERISA:

> [A] wage law that provides an option favoring certain ERISA plans and benefits (BAT approved [training] plans) over other ERISA plans and benefits (NEIEP [training program]) is not a law of "general application" and may be used to effect change in the administration structure and benefits of an ERISA plan. If a state is permitted to use a prevailing wage scheme to single out and favor certain ERISA plans, the potential for abuse is great--a state could avoid ERISA's preemption provision and covertly disturb or alter ERISA plans. We believe that defendants' ruling would discourage non-BAT approved ERISA training programs and encourage changes to NEIEP [training program], a national employee benefit program. We hold that defendants' ruling applying the state's prevailing wage law does "relate to" an employee benefit plan because the ruling's effects of NEIEP

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[20] *Calhoun* makes no distinction between "apprenticeship" and "training" programs.

> are not "tenuous, remote or peripheral." *See Shaw*, 463 U.S. at 100 n. 21, 103 S.Ct. at 2901 n. 21.

957 F.2d at 1561.[21]

Calhoun compels preemption of Respondent's application of Section 220, because Respondent has expressly favored only state-approved training programs, while disfavoring TAP's federally-approved training plan.[22]

III. THE FITZGERALD ACT DOES NOT PRESCRIBE APPRENTICE RATIOS, AND THUS DOES NOT SAVE RESPONDENT'S ORDER FROM PREEMPTION

Although DOL's 1989 Order as to "apprentice ratios" forms no part of the debarment order herein, TAP maintains a keen interest in that aspect of DOL's Order, because it affects the viability of TAP's training plan. The Eighth Circuit's holding in *Boise Cascade v. Peterson*, 939 F.2d 632 (8th Cir. 1992), *cert denied*, 112 S.Ct. 3014 (1992) unambiguously holds that ERISA preempts state regulation of "ratios" of trainees to journeymen, because such regulation intrudes most directly upon the terms of the ERISA plan. *Calhoun*, *supra*, is in full accord with *Boise Cascade*.

Contrary to Respondent's contentions (Resp. Br. 39-40), the Fitzgerald Act nowhere prescribes apprentice ratios.

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[21] *Calhoun* also rejected the state department of labor's argument that its application of the state prevailing wage law was spared from preemption by the Fitzgerald Act, 29 U.S.C. § 50, which the Court held "relates only to eligibility for federal registration" and "does not itself contemplate enforcement mechanisms". 957 F.2d at 1562.

[22] In addition, once TAP's cash payments are properly credited, pursuant to Point I above, not only are all shortfalls in non-ERISA supplements fully offset, but so are the shortfalls in journeymen's wages that were assessed as to TAP's three trainees, during their period of employment. Thus, even if Respondent's position as to trainees is sustained, no DOL order has concluded, based on a calculation properly crediting TAP's excess cash payments, that any underpayment ever existed as to the three trainees. If none exists, as is the case, the debarment order must be dissolved retroactively.

Rather, the applicable Fitzgerald Act regulations, 29 C.F.R. § 29.5(b)(7), merely require that the program *contain* written standards of numeric ratios of apprentices to journeyman, and do not proscribe the content of those standards. Respondent's attempt to enforce ratio standards "separate and apart" from the authorization of the Fitzgerald Act, is therefore pre-empted. *MacDonald, supra*; *Boise Cascade, supra*; *Calhoun, supra*; *accord, Associated Builders, supra*, 1992 WL 171906 at 10.

* * *

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January 13, 1995

Mr. Donald M. Sheraw
Chief Clerk of the Court
State of New York
Court of Appeals
Clerk's Office
20 Eagle Street
Albany, New York 12207

Re: M/O Tap Electrical Contacting Service Inc. Petitioner-Appellant v. Thomas M. Hartnett, Respondent-Respondent; App. Div. 2d Dep't Index No. 91-06489

Dear Mr. Sheraw:

This letter sets forth the response of petitioner-appellant TAP Electrical Contracting Service, Inc. ("TAP") to the Court of Appeals' January 5, 1995 *sua sponte* inquiry with respect to the jurisdictional basis of TAP's appeal, noticed on December 22, 1994. Therein, TAP noticed its appeal as of right from that portion of the August 29, 1994 Order and Judgment of the Appellate Division, Second Department which failed to annul as unconstitutional portions of a Determination and Order of the Commissioner of Labor of the State of New York (the "Commissioner's Determination") holding TAP in wilful violation of N.Y. Labor Law §220(3) and thereby "debarring" TAP from bidding on or receiving public works contracts for a 5-year period pursuant to § 220-b(3)(b).

A substantial constitutional question is directly involved in this appeal, as is demonstrated more fully below, because TAP's petition herein challenged the "apprenticeship" provisions of N.Y. Lab. Law § 220(3) as preempted by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq* ("ERISA"), and hence void as unconstitutional under the Supremacy Clause of the United States Constitution.

* * *

Substantial Constitutional Question

TAP's appeal herein raises the substantial constitutional question of whether the "apprenticeship" provisions of N.Y. Labor Law Section 220(3) impermissibly "relate to" and "purport to regulate" TAP's training program, which is an employee welfare benefit plan exclusively subject to federal regulation under ERISA § 514(a) and (c), 29 U.S.C. § 1144(a) and (c). If so, such apprenticeship provisions are void under the Supremacy Clause of the United States Constitution: "[t]here can be no dispute that the Supremacy Clause invalidates all state laws that conflict or interfere with an act of Congress." *Hayfield Northern R. Co. v. Chicago & North Western Transportation Co.*, 467 U.S. 622, 627, and n. 4 (1984); *Rose v. Arkansas State Police*, 107 S.Ct. 334, 335 (1986).

In further demonstration of the substantiality of this issue, we note that state prevailing wage laws and apprenticeship regulations similar to N.Y. Labor Law §220(3) that affect or purport to regulate ERISA plans have been widely held unconstitutional as preempted by ERISA. *See Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), *cert. denied* 112 S.Ct. 2991 (1992); *Boise Cascade Corp. v. Peterson*, 939 F.2d 632 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 3014 (1992); *National Elevator Industry v. Calhoun*, 957 F.2d 1555 (10th Cir. 1992), *cert. denied*, 113 St.Ct. 406 (1992); *General Electric Corp. v. New York Dept. of Labor*, 891 F.2d 25 (2d Cir. 1989), *cert. denied*, 496 U.S. 912 (1990); *ABC, Saginaw Valley Area v. Perry*, 2 WH Cases 2d 754 (E.D. Mich. 1994); *see generally, District of Columbia v. Greater Washington Board of Trade*, 113 S.Ct. 580 (1992) and cases cited therein. Indeed, the Second Circuit has recently further expanded its interpretation of the breadth of the ERISA preemption provisions to encompass an indirect effect on employee benefit plans. *Travelers Insurance Co. v. Cuomo*, 14 F.3d 708 (2d Cir. 1993) (reversing *Rebaldo v.*

Cuomo, 749 F.2d 133 (2d Cir. 1984)), *cert. applied for*, 62 USLW 3625 (1994).

* * *

Accordingly, TAP respectfully submits that a substantial Constitutional issue is directly involved herein, and has been raised below; TAP therefore seeks appeal to this Court as of right herein.

Thank you for your attention.

Respectfully Submitted

/s/

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[PAGES FROM PETITION, APPENDIX A, PP. 38-39 WHICH MAY HAVE BEEN INADVERTANTLY OMITTED IN PART FROM CERTAIN COPIES, RE-INCLUDED HEREIN]

SUPREME COURT — STATE OF NEW YORK

SHORT FORM ORDER

Present: HON. ELI WAGER Justice.

In the Matter of the Application of TAP ELECTRICAL CONTRACTING SERVICE, INC., PRIME CONTRACTOR Petitioner	TRIAL/IAS, PART X NASSAU COUNTY INDEX NUMBER 21830, 1989
For a Judgment pursuant to Article 78 of Civil Practice Law and Rules -against-	MOTION DATE November 22, 1989
THOMAS F. HARTNETT, as Commissioner of Labor of the State of New York Respondent	CHAMBERS NUMBER SP-2858 TRIAL CAL. NUMBER

The following papers read on this motion to annul order and determination

Order to Show Cause . . . 1.

Answering Affidavits . . . 2.

Replying Affidavits

Pleadings, Exhibits, Stipulation

Briefs: Plaintiff's/Petitioner's Defendant's/Respondent's.

Upon the foregoing papers it is ordered that this motion brought on by order to show cause and petition seeking an order of this court annulling the order and determination of the Commissioner of Labor is determined as follows.

The decision sought to be annulled was rendered after hearings conducted by the Department of Labor. Petitioner, as the basis for one of its challenges, asserts that under these circumstances, this proceeding must be, and hereby, is respectfully referred to the Supreme Court, Appellate Division, Second Department pursuant to CPLR 7604(g).

All stays are continued pending the transfer directed herein.

November 28, 1989 /s/ Eli Wager

J.S.C.